TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 435

HARRY LEV, PETITIONER,

vs.

UNITED STATES OF AMERICA.

No. 436

RAYMOND WOOL, PETITIONER,

vs.

UNITED STATES OF AMERICA.

No. 437

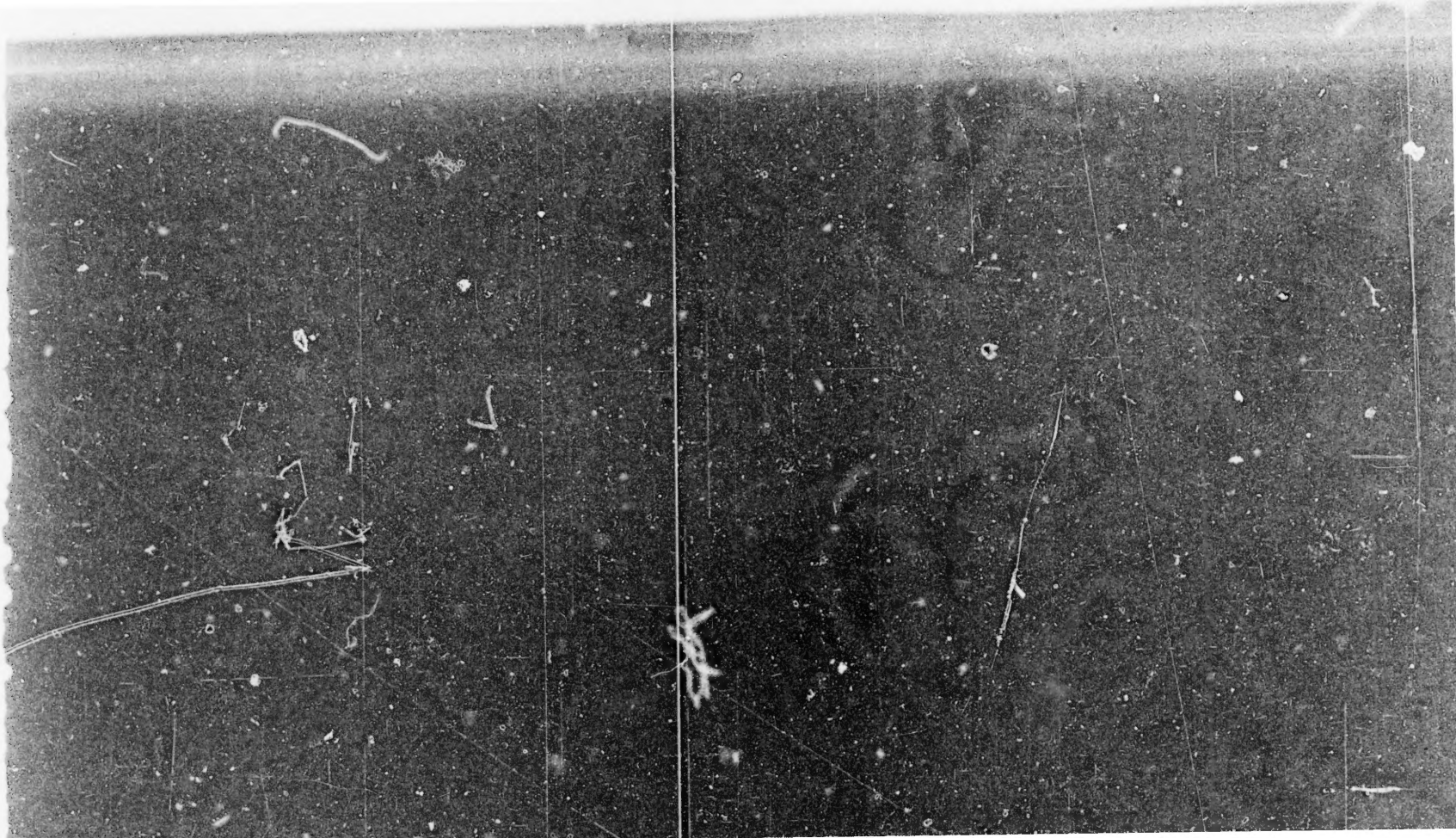
MARVIN RUBIN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONS FOR CERTIORARI FILED OCTOBER 10, 1958
CERTIORARI GRANTED DECEMBER 8, 1958



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IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Criminal Docket — Crim. No. C 149-324

TITLE OF CASE

THE UNITED STATES,

vs.

HARRY LEV	Ct 1
MARVIN RUBIN	Cts 1-2-3
MAURICE ADES	Ct 1
JOSEPH G. PORRECA	"
ERIC C. FARNELL	"
RAYMOND WOOL	"
MELLA HORT	"
DAVID POLLACK	"
GEORGE A. EARNSHAW.	"

VIOLATION

T 18, Secs. 371 and 201

Conspiracy to defraud the U S in the exercise of its governmental functions of administration and procurement of government contracts;

Offering of bribe with intent to influence decision of govt. official in N Y Quartermaster Procurement Agency.

Three counts.

DOCKET ENTRIES

DATE	DEFENDANT	FINED
5-15-57	Harry Lev	$5000.
"	Marvin Rubin	1000.
"	Maurice Ades	1500.
"	Raymond Wool	1500.
"	Mella Hort	1500.
5-17-57	Joseph G Porreca	3500.

DATE	NAME	AMT. REC'D	DISB.
5.16.57	Gallop C & G. for (Lev)	5—	5—
5.17.57	pd. U.S.TSy.	5—	5—
5.21.57	(H.Lev) J.L.Sullivan	5	
5.24.57	Pd U.S. Treas (atty)		5—
5.22.57	M. Ades (T.J.Rossi)	5—	5—
5.24.57	Pd.U.S.Tsy—		
5.23.57	A.H. Truman (R. Wool)	5—	5—
5.24.57	Pd. U.S. Tsy.		
6.6.57	(Pd. by prob. officer of N.Y. Mella Hort db)	125—	
6.7.57	Pd. U.S. Treas.		125—

DATE	CASH ACCT. DEFT.	REC'D	DISB.
7.19.57	M.Hort	125—	
7.23.57	pdUS.Tsy		125.—

DATE	PROCEEDINGS
3-22-56	Filed indictment. Ordered sealed. DAWSON, J.
4-16-56	Indictment ordered unsealed. NOONAN, J.
4-18-56	Filed notice of appearance by William M. Hort, 200 Hudson St. NYC as atty for Mella Hort.
4-19-56	Filed notice of appearance by Aranow, Brodsky, Bohlinger, Einhorn & Dann, 122 E 42nd St. NYC as Attys. for Joseph G. Porreca.
4-23-56	Filed notice of appearance by John T. Sullivan, 70 Pine St. NYC as atty for Marvin Rubin.
4-24-56	Filed notice of appearance by Harold Davis, 76 Beaver St. NY as atty for Maurice Ades.
4-26-56	Filed notice of appearance by John K. Carroll, 1 Wall St. NYC as atty for David Pollack.
[fol. 2]	
4-26-56	Filed notice of appearance by Parker, Chapin & Flattau, (Alvin K. Sylvester Esq.) 285 Madison Av. NYC as attys for Harry Lev.

DATE	PROCEEDINGS
4-26-56	Marvin Rubin pleads not guilty. Bail $1000. Maurice Ades pleads not guilty Bail 1000. Joseph G. Porreca pleads not guilty Bail $1000. Eric C. Farnell pleads not guilty. Released on own recognizance. Raymond Wool pleads not guilty. Bail $500. Mella Hort pleads not guilty. Released on own recognizance. David Pollack pleads not guilty. Released on own recognizance. Defts. ordered fingerprinted. Deft. paroled until 4 PM to give bail. Deft. to make motions returnable on or before 5-21-56. NOONAN, J.
4-26-56	Filed notice of appearance by Colonel Samuel Rowe, USA 12 E 41st St. NYC as atty for Major Eric C. Farnell.
4-26-56	Filed notice of appearance by Victor J. Herwitz, 156 Bway NYC as atty for Raymond Wool.
4-27-56	Filed affdt. consent and Order extending bail limits of deft. Maurice Ades. SUGARMAN, J.
4-30-56	Harry Lev pleads not guilty. Bail $1000. Paroled until 4 PM to give bail. Deft. ordered fingerprinted. Deft. to make motions returnable on or before 5-21-56. SUGARMAN, J.
4-30-56	Filed order extending bail limits of Harry Lev. SUGARMAN, J.
5- 1-56	Filed affdt. consent and order extending bail limits of Joseph Porreca. NOONAN, J.
5- 1-56	Filed affdt. consent and order extending bail limits of Raymond Wool. NOONAN, J.
5- 2-56	Lawrence Costiglio Esq. assigned as attorney to George A. Earnshaw. Deft. Earnshaw pleads not guilty. Released on own recognizance. Deft. ordered fingerprinted. Motion to be made returnable on or before 5-21-56. NOONAN, J.

DATE	PROCEEDINGS
5- 3-56	Filed notice of appearance by Lawrence N. Costiglio, 521 5th Av. NYC as atty for George A Earnshaw.
5- 8-56	Harold Davis relieved as attorney for Defendant Maurice Ades. Noonan J.
5-11-56	Filed notice of appearance by Thomas H. Casey, 45 John St. NYC as atty for Maurice Ades.
5-16-56	Filed substitution of Samuel W. Altman, 9 E 40th St. NYC as atty for deft. Harry Lev. So ordered. W V CONNELL, Clerk.
5-21-56	Filed substitution of Spar, Schlem & Burroughs, 160 Bway NYC as attys for deft. Mella Hort. So ordered. W V CONNELL, Clerk.
[fol. 3] 5-21-56	Filed affdt and notice of motion on behalf of deft. Major Eric C Farnell for a bill of particulars. (argued 5-28-56-Dec. Reserved)
5-21-56	Filed affdt and notice of motion on behalf of deft. Major Eric C. Farnell for an order severing the indictment and granting a separate trial. (argued on 5-28-56-decision reserved.
5-21-56	Filed affdt. and notice of motion on behalf of deft. Major Eric C. Farnell for an order to furnish deft. with copy of minutes of Grand Jury. (argued on 5-28-56-decision resrved)
5-23-56	Filed affdt. and notice of motion on behalf of deft. George A. Earnshaw for a severance and a separate trial. (argued on 5-28-56-Dec. Reserved)
5-23-56	Filed affdt. and notice of motion on behalf of deft. George A. Earnshaw for a bill of particulars. (argued on 5-28-56-Dec. reserved)
5-25-56	Filed affdt. and notice of motion for a Bill of Particulars on behalf of defendant Mella Hort, returnable 5-28-56.

DATE	PROCEEDINGS
5-28-56	Motions by deft. Eric C. Farnell for 1. separate trial; 2. Bill of Particulars and 3. to inspect G. J. minutes—Argued. Decision reserved. WEINFELD, J.
5-28-56	Motions by deft. George A. Earnshaw for severance and a separate trial and for Bill of Particulars. Argued. Dec. reserved. WEINFELD, J.
5-28-56	Motion by deft. Mella Hort for Bill of Particulars —Argued Decision reserved. WEINFELD, J.
5-29-56	Memo endorsed—Motion by deft. Farnell for separate trial—Motion denied. WEINFELD, J. (See memo endorsed)
5-29-56	Memo endorsed—Motion by deft. Farnell for bill of particulars. Motion granted only to the extent that Item 2 was granted in the application made by the deft. Earnshaw. In all other respects the motion is denied. WEINFELD, J. (See memo endorsed)
5-29-56	Memo endorsed—Motion by deft. Farnell to inspection Grand Jury Minutes. Motion denied. WEINFELD, J. (See memo endorsed)
5-29-56	Memo endorsed—Motion by deft. Hort for bill of particulars—Motion granted only to the extent that Item 2 was granted in the application made by the deft. Earnshaw. In all other respect the within motion is denied. WEINFELD, J. (See memo endorsed)
5-29-56	Filed govt's affdt in opposition to motion by deft. Hort for bill of particulars.
5-29-56	Memo endorsed—Motion by deft. Earnshaw for bill of particulars—Granted as to item 2. Enter order. WEINFELD, J. (See memo endorsed)
6-12-56	Filed notice of settlement and order that the U S serve and file a bill of particulars as to Defts. Farnell, Hort & Earnshow; it is fur-

DATE	PROCEEDINGS
	ther ordered that defts. may inspect any exhibit marked in evidence during the Senate Hearings on textile procurement in the military services, 84th Congress. 1st session, 1955. WEINFELD, J.
[fol. 4]	
6-19-56	Joseph G. Porreca pleads guilty to count one. Atty present. Sentence adjd to 9-4-56. Bail cont'd. McGOHEY, J.
6-21-56	Filed bills of particulars (3) as to Eric C. Farnell, Mella Hort & George A. Earnshaw.
9- 4-56	Filed stipulation of substitution of attys Galiop, Climenko & Gould 30 Broad St. NYC in place and stead of Samuel W. Altman, for Deft Harry Lev. So ordered 9-4-56 HERBERT A. CHARLSON, Clerk.
10- 2-56	Filed affidavit and notice of motion of Milton S. Gould, for Bill of particulars.
10- 2-56	Filed affidavit and notice of motion of Harry Lev, for and Order dismissing indictment, Granting a seperate trial, and inspection of Grand Jury minutes.
10-10-56	Filed Transcript of record of proceedings, dated 5/2/56
10-16-56	Motion by deft Harry Lev to dismiss indictment, etc.,—argued. Decision reserved
10-16-56	Motion for a bill of particulars.—submitted. Decision reserved.
10-30-56	Filed affdt. of George S. Leisure Jr. dated 10-10-56.
10-30-56	Filed memorandum #23001 by BRYAN, J. Motion to dismiss indictment and for a severance as to Deft. Lev is denied. Motion for particulars as to items 9 and 10 are granted and all other items are denied.

DATE	PROCEEDINGS
11-13-56	Filed notice of settlement and order by the Government dated 11-9-56. ordering that the Government with. ten days of entry of this order serve deft Harry Lev with a bill of particulars and granting the deft Harry Lev to inspect any exhibit marked in evidence during the Senate Hearings on Textile Procurement in the Military Services, 84th Congress, 1st Session, 1955. BRYAN, J.
11-13-56	Filed notice of settlement and order by the deft. Harry Lev. (Counter Order--unsigned).
11-16-56	Filed Government's Bill of Particulars as to deft. Harry Lev.
12-13-56	Filed Transcript of record of proceedings, dated 6/19/56
1-30-57	Victor Herwitz Esq. allowed to withdraw as Attorney for deft. Raymond Wooi. SUGARMAN, J.
2- 8-57	Filed affidavit of Fioravante G. Perrotta, Assist U.S. Atty dated 2-6-57 and order authorizing the U.S. Atty to employ a physician to conduct a physical examination as to the condition of Louis I. Alperstein, Ilona Hotel Apartments, 1210 N.E. 110th St. Miami, Florida to determine whether or not said Louis I. Alperstein is physically able to attend and give evidence in this case. WALSH, J.
2-13-57	Thomas H. Casey Esq, allowed to withdraw as Attorney for Deft. Maurice Ades, NOONAN, J.
2-14-57	Filed notice of appearance of Atty Albert H. Treiman, 261 Broadway, NYC for Raymond Wool.
[fol. 5] 2-28-57	Filed affidavit and order authorizing Dr. Wm. Hitzig, 787 Park Ave., NYC to conduct an examination of Leon M. Levy at Coney Island City Hospital, Brooklyn, NY for the purpose of enabling the Court to determine whether or not the said Leon M. Levy is physically able to attend and give evidence in this case. dated 2-27-57. KAUFMAN, J.

DATE	PROCEEDINGS
2-15-57	Filed bond dated 4-26-56 in the sum of $500 for Raymond Wool. Citizens Casualty Co. (Surety)
2-15-57	Filed bond dated 4-26-56 in the sum of $1,000. for Maurice Ades. Citizens Casualty Co. (Surety)
2-15-57	Filed bond dated 4-26-56 in the sum of $1,000 for Harry Lev. National Surety Corp. (Surety)
2-15-57	Filed bonds (2) in the sum of $1,000 each for Marvin Rubin and Joseph G. Porreca dated 4-26-56. Public Service Mutual Ins. Co. (Surety)
3- 8-57	Filed order and affidavit authorizing Dr. Philip Goldstein, 3100 Ocean Pkway, Brooklyn, NY to conduct an examination as to the physical condition of Leon M. Levy at Coney Island City Hospital, Brooklyn, NY for the purpose of enabling the Court to determine whether or not said Leon M. Levy is Physically able to attend and give evidence in this case etc. KAUFMAN, J.
3-13-57	Filed notice of appearance of Atty John J. Donovan, 1 Wall St., NYC as co-counsel for David Pollack.
3-20-57	Filed notice of appearance of Atty. Lucian J. Rossi, 23 E. 26th St., NYC for deft. Maurice Ades.
3-21-57	Filed affidavit and order authorizing Dr. Archie McCallister, 8340 E. Second Ave., Miami, Florida to conduct an examination as to the physical condition of Louis Alperstein, for the purpose of enabling the Court to determine whether or not he is physically able to attend and give evidence in this case, further ordered that the U.S. Atty is authorized to pay a reasonable fee to Dr. Archie McCallister for said examination. KAUFMAN, J.
3-22-57	Filed Transcript of record of proceedings, dated 3-19-54
3-20-57	Before I R KAUFMAN, J. Trial begun as to Defts. Lev, Rubin, Ades, Wool, Hort and Pollack.

DATE	PROCEEDINGS
	Severed as to defts. Farnell and Earnshaw. Trial continued on March 21, 22, 25, 26, 27, 28, 29, April 1, 2, 3, 1957.
4- 4-57	Trial cont'd.
4- 5-57	Trial cont'd,—Defts. motions to dismiss—Denied
4- 8-57	Trial cont'd.
4- 9-57	Trial cont'd.
4-10-57	Trial cont'd.
4-11-57	Trial cont'd.
4-12-57	Trial cont'd.
4-15-57	Trial cont'd.
4-17-57	Trial cont'd.
[fol. 6]	
4-18-57	Trial cont'd.
4-19-57	Trial cont'd.
4-22-57	Trial cont'd.—All defts rests. Gov't rests.
4-23-57	Trial cont'd.—Summations
4-24-57	Trial cont'd.—Summations continued.
4-25-57	Trial cont'd—Charge by the Court. Jury retires to deliberate.
4-26-57	Trial cont'd. and concluded. Jury returns the following Verdict. Harry Lev.—"Guilty on Count 1. Marvin Rubin "Guilty on counts 1 and 3. "Not Guilty" on count 2. Maurice Ades—"Guilty" on Count 1. Raymond Wool—"Guilty on Count 1. Mella Hort—"Guilty" on Count 1. David Pollack —"Not Guilty". Jury recommends leniency for all defendants. All defendant's motions made and renewed.—Denied. Pre-Sentence reports ordered by 5-15-57 at 10:30 A.M. Bail continued for all defendants. Mella Hort released on own recognizance. I. R. KAUFMAN, J.

DATE	PROCEEDINGS
5-15-57	Filed Judgment #61,609 Harry Lev—Ct 1—Nine Months at a place of confinement to be designated by the Atty Genl and fined $5000. and to stand committed until fine is paid or he is otherwise discharged according to law. Bail continued pending appeal. I. R. KAUFMAN, J.
5-15-57	Filed Judgment #61,608 Marvin Rubin—Fifteen Months on each of counts 1 and 3 to run concurrently with each other at a place of confinement to be designated by the Atty Genl. and fined $1000. on count one. Deft. to stand committed until fine is paid or he is otherwise discharged according to law. Deft. shall surrender to U S marshal for service of sentence on May 29, 1957. Bail cont'd. I R KAUFMAN, J.
5-15-57	Filed Judgment #61,605 Raymond Wool—Ct 1—Eighteen Months at a place of confinement to be designated by the Atty Genl. and fined $1500. and to stand committed until fine is paid or he is otherwise discharged according to law. Bail continued pending appeal. I R KAUFMAN, J.
5-15-57	Filed Judgment #61,607 Maurice Ades—Imposition of sentence suspended on count 1. Probation for two years, subject to the standing probation order of this Court and fined $1500. Fine to be paid within one year or defendant to be committed until fine is paid or otherwise discharged according to law. I R KAUFMAN, J.
5-15-57	Filed Judgment #61,606 Mella Hort—Imposition of sentence suspended on count 1. Probation for two years, subject to the standing probation order of this Court and fined $1500. Fine to be paid within one year or defendant to be committed until fine is paid or otherwise discharged according to law. I R KAUFMAN, J.
5-15-57	Issued commitments and copies as to defts. Lev, Rubin and Wool.
5-16-57	Filed Notice of appeal by Deft. Harry Lev. $5.00

DATE	PROCEEDINGS
5-17-57	Filed Judgment #61,616 Joseph G. Porreca—Imposition of prison sentence suspended. Probation for two years, subject to the standing probation order of this Court. Fined $3500. to be paid in one year or to be committed until fine is paid or he is otherwise discharged according to law. I R KAUFMAN, J.
[fol. 7]	
5-21-57	Filed notice of appeal by deft. Marvin Rubin. $5.00
5-22-57	Filed notice of appeal by deft. Maurice Ades. $5.00
5-23-57	Filed notice of appeal by deft. Raymond Wool. $5.00
5-24-57	Filed order admitting deft. Marvin L. Rubin to bail pending appeal in the sum of $2,500. and in event that his appeal is not promptly prosecuted, or that the proceedings are not docketed in 30 days, the Government may move to revoke bail.
5-29-57	Filed Bond pending appeal dated 5-29-57 for Harry Lev, in the sum of $1,000. National Surety Corporation. (Surety).
5-29-57	Filed Bond pending appeal dated 5-29-57 for Marvin Rubin in the sum of $2,500. Public Service Mutual Insurance Company. (Surety).
6- 5-57	Filed Bond pending appeal dated 6-5-57 for Raymond Wool in the sum of $500. Public Service Mutual Insurance Company. (Surety).
6-27-57	Filed Transcript of record (2) of proceedings, dated 5/17/57
8-22-57	Filed Transcripts of record of proceedings 3 Vol., dated March 20, 21, 25, 26, 27, 28, 29-1957—April 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 17, 18, 19, 22, 24, 25, 26,-1957 & May 15, 1957.

	NAME	RECEIVED	DISBURSED
8-22-57	M. Hort	125.00	
8-23-57	Pd. U. S. Treas.		125.00

[fol. 8]

In United States District Court
Southern District of New York

C-149-324

United States of America,

—v—

Harry Lev, Marvin Rubin, Maurice Ades, Joseph G. Porreca, Eric C. Farnell, Raymond Wool, Mella Hort, David Pollack and George A. Earnshaw, Defendants.

Indictment—Filed March 22, 1956

The Grand Jury charges:

1. From on or about January 1, 1951, and continuing up to and including the date of filing of this indictment in the Southern District of New York, Harry Lev, Marvin Rubin, Maurice Ades, Joseph G. Porreca, Eric C. Farnell, Raymond Wool, Mella Hort, David Pollack and George A. Earnshaw, the defendants, did unlawfully, wilfully and knowing combined, conspire, confederate and agree together, and with each other and with divers other persons to the Grand Jurors unknown, to defraud the United States in the exercise of its governmental functions of administration and procurement of government contracts free from unlawful impairment, obstruction, partiality, improper influence, dishonesty, fraud and corruption, and in its right and interest in the conscientious, honest and faithful services, judgements, determinations and actions of the defendants Joseph G. Porreca, Eric C. Farnell, Raymond Wool, Mella Hort, David Pollack and George A. Earnshaw, and duly appointed employees of agencies of the United States, to wit, the New York Quartermaster Procurement Agency (hereinafter referred to as the NYQMPA), and the Armed Services Textile and Apparel Procurement Agency (hereinafter referred to as the ASTAPA), free from corruption, partiality, improper influence, dishonesty, bias, hope of unlawful reward and fraud.

2. During the course of the conspiracy defendant Joseph G. Porreca was a Clothing Inspector and Chief Inspector of the Textile Fabrication Branch of the NYQMPA.

[fol. 9] 3. During the course of the conspiracy defendant Eric C. Farnell was a Contracting Officer in the NYQMPA, and Chief of the Clothing Purchasing Branch of the ASTAPA.

4. During the course of the conspiracy defendant Raymond Wool was Chief of the Headwear, Knitwear, Rainwear Section, Clothing Purchasing Branch, Purchasing Division of the ASTAPA.

5. During the course of the conspiracy defendant Mella Hort was a Procurement Clerk in the NYQMPA, and a Contract Administration Clerk in the ASTAPA.

6. During the course of the conspiracy defendant David Pollack was a Business Accountant in the NYQMPA and in the ASTAPA.

7. During the course of the conspiracy defendant George A. Earnshaw was a Purchasing Agent for the NYQMPA and the ASTAPA.

8. It was part of the conspiracy that the defendants Harry Lev, Marvin Rubin and Maurice Ades would offer to give and give money and other things of value to officers, employees and persons acting for and on behalf of the NYQMPA and the ASTAPA, for the purpose of inducing them to corruptly disclose confidential information prior to the awarding of government contracts, which information would enable said defendants to be low bidders on such contracts.

9. It was further a part of the conspiracy that the defendants Harry Lev, Marvin Rubin and Maurice Ades would offer to give and give money and other things of value to officers, employees and persons acting for and on behalf of the NYQMPA and the ASTAPA for the purpose of inducing them to corruptly grant deviations in the specifications of government contracts, which deviations might result in loss of moneys to the United States.

10. It was further a part of the conspiracy that the defendants would offer to give and give money and other things of value to clothing inspectors employed by the NYQMPA for the purpose of influencing their decisions and actions on matters pending before the said clothing inspectors in their official capacities as inspectors of clothing and apparel for the United States Army, Navy and Air Force.

11. It was further a part of the conspiracy that defen- [fol. 10] dants Joseph G. Porreca, Eric C. Farnell, Raymond Wool, Mella Hort, David Pollack, George A. Earnshaw, and other co-conspirators to the Grand Jurors unknown, in their capacities as officers, employees and persons acting for and on behalf of the NYQMPA and the ASTAPA would corruptly accept moneys, gratuities and other things of value with intent to have their decisions and actions influenced thereby on matters and contracts pending before them in their official capacities within the said agencies of the United States.

12. It was further a part of the conspiracy that the defendants and other co-conspirators to the Grand Jurors unknown, would at all times misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the purposes of, and the acts done in furtherance of said conspiracy.

Overt Acts

The Grand Jury further charges that the defendants and co-conspirators to the Grand Jurors unknown, in furtherance of and for the purpose of carrying into execution said combination, conspiracy, confederation and agreement, did and performed the following and other overt acts, to wit:

1. In or about March 1952, in the Southern District of New York, defendant Marvin Rubin stated and represented to Leon Levy and defendant Maurice Ades that he had connections and influence with officers, employees and persons acting for and on behalf of the NYQMPA, and that he could obtain for the said Leon Levy and Maurice Ades,

special advantages and preferential treatment in the awarding and administration of government contracts.

2. In or about May 1952, in Chicago Illinois, defendant Harry Lev offered to pay $50 a week to Michael Weintraub when the said Michael Weintraub was then and there acting as an Inspector for and on behalf of the NYQMPA.

3. On or about June 13, 1952, in the Southern District of New York, defendant Marvin Rubin delivered and caused to be delivered to defendant Eric C. Farnell the sum of $1,000 in United States currency.

4. On or about August 27, 1952, in the Southern District of New York, defendant Marvin Rubin delivered and caused to be delivered to defendant David Pollack the sum of $500 in United States currency.

[fol. 11] 5. On or about December 24, 1952, in the Southern District of New York, defendant Marvin Rubin delivered and caused to be delivered to defendant Joseph G. Porreca a nine cubic foot deep freeze unit.

6. On or about October 14, 1952, in the Southern District of New York, defendants Marvin Rubin and Joseph G. Porreca caused Inspector William Ienni to be transferred to Mayaguez, Puerto Rico.

7. On or about December 22, 1952, in the Southern District of New York, defendant Marvin Rubin delivered and caused to be delivered to defendant George A. Earnshaw a quantity of whiskey of the approximate value of $17.55.

8. On or about May 12, 1953, in San Juan, Puerto Rico, defendants Harry Lev, Marvin Rubin and Maurice Ades held a meeting with Inspector Louis I. Alperstein.

9. On or about June 11, 1953, in the Southern District of New York, the defendant Marvin Rubin caused a check for $285 to be delivered to William D. Franklin in payment of medical expenses incurred by defendant Raymond Wool.

10. On or about August 12, 1953, in the Southern District of New York, defendant Marvin Rubin delivered and caused

to be delivered to Jerome Schlessinger, a plane ticket to Puerto Rico and the sum of $50 in United States currency.

(Title 18, United States Code, Section 371).

Second Count

The Grand Jury further charges:

On or about August 27, 1952, in the Southern District of New York, Marvin Rubin, defendant herein, promised, offered to give and gave the sum of $500 in United States currency to David Pollack, the said David Pollack being then and there an employee of and a person acting for and on behalf of an agency of the United States, to wit, the New York Quartermaster Procurement Agency, with intent to influence the decisions and actions of the said David Pollack on matters at that time pending, and which might by law be brought before him in his official capacity as a Business Accountant in the New York Quartermaster Procurement Agency.

(Title 18, United States Code, Section 201).

[fol. 12] Third Count

The Grand Jury further charges:

On or about December 24, 1952, in the Southern District of New York, Marvin Rubin, defendant herein, promised, offered to give and gave a nine cubic foot deep freeze unit to Joseph G. Porreca, the said Joseph G. Porreca being then and there an employee of and a person acting for and on behalf of an agency of the United States, to wit, the New York Quartermaster Procurement Agency, with intent to influence the decisions and actions of the said Joseph G. Porreca on matters at that time pending and which might by law be brought before him in his official capacity as a Clothing Inspector in the New York Quartermaster Procurement Agency.

(Title 18, United States Code, Section 201).

/s/ Paul W. Williams, United States Attorney.

/s/ Peyton K. Royal, Foreman.

SENTENCE

5-15-57 Raymond Wool—18 months on ct 1 and fined $1500—Bail contd pending appeal. Committed fine

5-15-57 Mella Hort—Imposition of prison sentence suspended. Probation for 2 years. Fined $1500 Committed fine I R Kaufman J

5-17-57 Joseph G. Porreca Imposition of prison sentence suspended. Probation for 2 years Fined $3500 to be paid in 1 year. Committed fine. I R Kaufman J

[fol. 13]

5- 2-56 George A. Earnshaw Deft. Ordered fingerprinted. Released on own recognizance Motion to be made returnable on or before 5/21/56 Noonan J

6-19-56 Joseph G. Porreca Pleads guilty, Attorney present. (Count one) Sentence adjourned until. 9/4/56. Bail continued. McGohey J

1-30-57 Victor Herwitz Esq allowed to withdraw as attorney for defendant Raymond Wool. Sugarman J

2-13-57 Thomas H. Casey, Esq. allowed to withdraw as attorney for defendant Maurice Ades. Noonan J.

3-20-57 Trial begun before Hon I R Kaufman J Jury duly empanelled & sworn—Govt motion to sever as to Defts Farnell & Earnshaw. Granted. Trial begun as to Defts: Lev, Rubin, Ades Wool Hort & Pollack.

3-21-57 Trial cont'd

3-22-57 Trial cont'd

3-25-57 Trial cont'd

3-26-57 Trial cont'd

3-27-57 Trial cont'd

3-28-57 Trial cont'd

SENTENCE

3-29-57 Trial cont'd

4- 1-57 Trial cont'd

4- 2-57 Trial cont'd

4- 3-57 Trial cont'd

4- 4-57 Trial cont'd

4- 5-57 Trial contd. Govt rests—Defts motions to dismiss Denied.

4- 8-57 Trial cont'd

4- 9-57 Trial contd.

4-10-57 Trial contd.

4-11-57 Trial contd.

4-12-57 Trial contd Deft Rubin rests

4-15-57 Trial contd & adjnd to 4/17/57

4-17-57 Trial contd. Deft Lev rests

4-18-57 Trial contd. Deft Lev rests, Ades rests. Wool rests.

4-19-57 Trial contd

4-22-57 Trial contd. Deft Hort rests, Deft Pollack rests, —all Defts rests. Both sides rest.

4-23-57 Trial contd Summations by Defts Pollack, Hort, Wool, Ades & Lev.

4-24-57 Trial contd. Summation by Deft Rubin and Govts summations, all defts motion for mistrial—denied.

[fol. 14]

4-25-57 Trial contd. Charge by the Court. Marshals sworn—Jury out to deliberate at 2:15 P.M. Jury sent to Hotel at 12:00 A.M. to resume deliberation at 10:00 A M—4/26/57.

4-26-57 Trial contd. Jury deliberating at 10:00 A.M. Jury returns at 2:00 P.M. with verdict—
Deft Harry Lev guilty on ct 1.

SENTENCE

Deft Marvin Rubin guilty on ct 1 and ct 3 Not guilty on ct 2.
Deft Maurice Ades guilty on ct 1
Deft Raymond Wool guilty on ct 1
Deft Mella Hort guilty on ct 1.
Deft David Pollack not guilty.
With recommendation of leniency for all defts.
All defts motions made & renewed—Denied.
Pre Sentence reports ordered by May 15 at 10:30 A.M. Bail contd for all uefts O.R. for Mella Hort. I R Kaufman J

5-15-57 Harry Lev—9 months on ct 1 & fined $5000 Bail contd pending appeal. Committed fines.

5-15-57 Marvin Rubin—15 months on ct 1—Fined $1000 15 months on ct 3—to run concurrently with ct 1. Deft Rubin to surrender on May 29, 1957—at 10:30 A.M. in Room 318—Bail contd. Committed fine

5-15-57 Maurice Ades—Imposition of prison sentence suspended—2 years probation Fined $1500 Committed fine. 1 yr to pay fine

[fol. 15]

4-16-56 Indictment ordered unsealed. Noonan J.

4-26-56 Marvin Rubin Pleads not guilty—Bail $1000.
Maurice Ades Pleads not guilty—Bail $1000.
Joseph G. Porreca Pleads not guilty—Bail $1000.
Eric C. Farnell Pleads not guilty—Released on own recognizance
Raymond Wool Pleads not guilty—Bail $500.
Mella Hort Pleads not guilty—Released on own recognizance
David Pollack Pleads not guilty—Released on own recognizance
Defts. Ordered fingerprinted
Defts. Paroled until 4 P.M. to give bail
Defts. to make motions returnable on or before 5/21/56. Noonan, J.

SENTENCE

4-30-56 Harry Lev Pleads not guilty—Bail $1000.
Paroled until 4 P.M. to give bail
Deft. Ordered fingerprinted
Deft. to make motions returnable on or before 5/21/56. Sugarman, J.

5- 2-56 Lawrence Costiglio, Esq. assigned as attorney to George A. Earnshaw Pleads not guilty.

C 149-324

U. S.....Court

THE UNITED STATES OF AMERICA,

vs.

HARRY LEV, MARVIN RUBIN, MAURICE ADES, JOSEPH G. PORRECA, ERIC C. FARNELL, RAYMOND WOOL, MELLA HORT, DAVID POLLACK and GEORGE A. EARNSHAW, Defendants.

Indictment

Conspired, confederated and agreed together to defraud the U.S. by influence, dishonesty and corruption of government employees in violation of Title 18, U.S.C., Sections 201 and 371.

Paul W. Williams, United States Attorney.

A True Bill

/s/ Peyton K. Royal, Foreman.

[fol. 296]

Transcript of Testimony

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Mr. Christy: The Government calls Melvin Carlin.

MELVIN CARLIN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Christy:

Q. Mr. Carlin, where do you live?
A. 11 Downer Avenue, Scarsdale, New York.
Q. What is your occupation, sir?
A. I am a certified public accountant.
Q. Are you licensed in the State of New York?
[fol. 297] A. Yes.
Q. How long have you been so licensed?
A. 20 years.
Q. Do you have an office in New York, Mr. Carlin?
A. Yes.
Q. Where is that located?
A. 261 Madison Avenue.
Q. Are you presently self-employed?
A. Yes.
Q. Mr. Carlin, at any time did you perform accounting services for a company known as Bonita Originals?
A. Yes.
Q. Do you recall when you commenced working for Bonita?
A. Yes. Early in 1952.
Q. And what was Bonita? Was it a corporation, a company? Will you tell us what it was.
A. It was a corporation.
Q. Do you know who the officers were?
A. I knew them to be Maurice Ades and Leon Levy.

Q. Do you see the defendant Ades in the courtroom?
A. Yes.
[fol. 298] Q. Will you point him out, please.
A. Right there (indicating).

Mr. Christy: May the record indicate the witness has identified the defendant Ades?
The Court: Yes.

Q. Do you recall the offices that each of these men held?

Mr. Gould: If your Honor please, may I suggest that before we go any further with this line we ought to get a time.
The Court: All right.
Mr. Christy: I believe the witness stated that he started work in 1952.
The Court: No. You asked him what offices they held. They may have held different offices.

Q. At the time, Mr. Carlin, that you started work, do you recall the offices which each man held?
A. As before, they, Ades and Levy were the officers at the time I became associated with the firm.
Q. Were there any other officers?
A. None that I knew of.
[fol. 299] Q. Do you recall which office each of these men held?
A. I do not recall that.
Q. Do you recall where the offices were?
A. Yes. On 34th Street, 33 West 34th Street.
Q. Would you tell us, Mr. Carlin, how you came to be accountant for Bonita?
A. I was recommended to them by an engineering firm known as Capelin Associates.
Q. And what kind of a firm was that?
A. They were industrial engineers, were and are.
Q. At the time you became accountant for Bonita, what line of business was Bonita in?
A. They were manufacturing children's dresses.
[fol. 300] Q. Where were these dresses manufactured?
A. They were manufactured in Puerto Rico.

Q. Do you recall the name of the company?
A. Yes. That was the Maurice Embroidery Works.
Q. Where in Puerto Rico was that?
A. The town or City of Mayaguez.
Q. What was the relationship between Maurice Embroidery Works and Bonita?
A. They were affiliated companies.
Q. Do you know how the stock was held in Maurice Embroidery Works? Do you recall?
A. The companies were owned equally by Ades and Levy.
Q. When you say "the companies," you are referring to?
A. Maurice Embroidery Works and Bonita Originals.
Q. Mr. Carlin, at the time you began you accounting services for Bonita, what was the financial position of Bonita?
A. It was very precarious.
Q. Had they lost money?
A. Yes.
[fol. 301] Q. Were they behind in some of their payments?
A. Behind in most of their payments.
Q. After you became accountant did you have any conversations with anybody about improving the financial condition?
A. Yes. That was one of the first things we discussed when I began working with the firm.
Q. And with whom did you discuss them?
A. With Ades and Levy.
Q. And generally, what did you say?

Mr. Gould: May the record show, your Honor, that I have a continuing objection to this line, so that I don't interrupt, as not binding on the defendant Levy.

The Court: All right.

Mr. Sullivan: If the Court please, I object to conversations between Levy and Ades as not binding upon the defendant Rubin.

Mr. Treiman: Same objection on behalf of the defendant Wool.

Mr. Spar: Same objection on behalf of the defendant Mella Hort.

Mr. Carroll: Objection on behalf of the defendant Pollack.

[fol. 302] The Court: The objection is overruled and the testimony is taken subject to connection.

Mr. Christy: Will you read the last question, Mr. Reporter, please?

(Question read.)

A. May I go a little beyond that?

Mr. Sullivan: If the Court please, I object to the question "generally, what did they discuss." I would like to have the time of that conversation more specific.

The Court: Fix the time. What do you mean by "generally"?

Mr. Christy: Your Honor, the witness has just testified that shortly after he came in he had conversations with Mr. Ades and Mr. Levy about improving their financial condition.

The Court: In 1952?

Mr. Christy: In 1952.

The Court: Approximately when in '52?

The Witness: Early, March 1st.

The Court: All right, proceed.

By Mr. Christy:

Q. Now, would you tell us generally what those conversations were?

[fol. 303] A. Well, they were perhaps normal as an accountant would be engaged to work in a firm. We looked at their financial condition, and as I said, it was precarious, and I discussed with them methods of improving it; of simpler things, such as improving sales and liquidating inventories and causing the business to become profitable, as much as we could intelligently control it.

Q. Mr. Carlin, you said that you started work in early '52; when did you cease working for Bonita?

A. About July 15th of the same year.

Q. Did you start work at Bonita again after July 15th?

A. Yes.

Q. Approximately when was that?

A. About three months later; early October, about October 1st.

Q. And for how long did you work at that time?
A. About six weeks.
Q. Mr. Carlin, do you know a man named Marvin Rubin?
A. Yes.
Q. Do you see him in the courtroom?
[fol. 304] A. Yes.
Q. Would you point him out, please?
A. Second from the right there.

Mr. Christy: May the record indicate the witness has identified the defendant, your Honor?
The Court: Very well.

Q. Directing your attention to the early part of 1952 when you became the accountant, did you have occasion to see Marvin Rubin about this time?
A. At this time, no.
Q. After you had become the accountant did you have occasion to see him?
A. Yes.
Q. Had you met Marvin Rubin before?
A. Yes.
Q. Going back again to the time when you met Rubin in 1952, after you had become the accountant, will you tell us the circumstances under which you met him?
A. A former associate of mine, for whom I had worked – with whom I had worked—a fellow by the name of Richard Herson, called me. He had learned that I was working as the accountant for a firm who had a plant in Puerto Rico and he told me that Rubin, with whom he was quite [fol. 305] friendly, was looking for someone, was looking for a plant in Puerto Rico.
Q. Following that did you meet Rubin?
A. Yes.
Q. Where did you meet him?
A. The office of Bonita.
Q. Do you recall approximately when that was?
A. That was, I'd say, April, May of '52.
Q. Will you tell us who was present at this meeting?
A. Ades, Levy, Rubin and myself.
Q. And what did Rubin say, as best you can recall?

Mr. Spar: If your Honor pleases, on behalf of the defendant Hort may I object to the entire line of questioning, on the ground that it is not binding upon the defendant Hort, and if it is accepted, that it be accepted only subject to connection.

The Court: Is not binding on the defendant Hort?

Mr. Spar: Hort.

The Court: Well, I have made my ruling. It is a similar type of ruling. Your objection will be considered as having [fol. 306] been taken to this line of testimony.

Mr. Spar: Entire line. Thank you.

The Court: (Continuing) Upon the ground, as I understand it, that it antecedes the time when your client is first mentioned in connection with this alleged charge.

Mr. Spar: That's right, sir.

The Court: That is the purpose of your objection. Your objection is overruled and the testimony is taken subject to connection.

Q. Mr. Carlin, will you tell us what Mr. Rubin said at this meeting, as best you can recall?

A. He said that he could obtain Government work and wanted to know whether we were willing to take Government work and generally the basis upon which Rubin could become interested in the firm.

Q. Did you discuss the factory in Puerto Rico?

A. Yes.

Q. Will you tell us, sir, what Rubin said about the Government work?

A. He said that he could obtain Government work.

[fol. 307] Q. Did he say how?

A. He said he knew people at the Quartermaster Corps who would assist him in getting work.

Q. When he referred to the Quartermaster Corps, did you know what that meant?

A. I presume it was the procurement agency on 16th Street.

Q. Did he mention 16th Street?

A. Yes, the—yes.

Q. Was there also some discussion about the profits on this Government work?

A. Yes.

Q. What was said, as best you can recall?

A. Rubin wanted half the profits that might be derived from Government contracts.

Q. That Bonita would handle?

A. Yes.

Q. Was any agreement reached on this subject at this meeting?

A. No final agreement was made at this time.

Q. After this meeting did you talk to Levy and Ades?

A. Yes.

Q. What was said at that time?

[fol. 308] A. Well, we discussed Marvin Rubin's offer and we generally agreed to accept it, and we were going to try to get him to accept a third of the profits rather than a half.

Q. Mr. Carlin, after this first meeting and prior to the time that any awards were made to Bonita, did you have subsequent meetings with Rubin?

A. Yes.

Q. Do you recall approximately how many there were?

A. I'd say about a half a dozen.

Q. Who was present at these meetings?

A. Ades, Levy, Rubin and myself.

Q. Where did these meetings take place?

A. At the office of Bonita.

Q. Following—

The Court: Where was that located, that office?

The Witness: 33 West 34th Street.

Mr. Christy: 33 West 34th Street, your Honor.

The Court: Go ahead.

Q. After this first meeting with Rubin and Levy, did [fol. 309] you have another meeting?

A. Yes. I said half a dozen.

Q. All right. Now, at any of these meetings was there discussion about the division of the profits?

A. Yes.

Q. What was said, as best you recall?

A. Rubin agreed to take this third, third of the profits against his original proposal of asking for a half.

Q. At these subsequent meetings was there further discussion about the Government contracts?

A. Yes.

Q. What did Rubin say about the Government contracts?

A. Well, we were considering various garments to be obtained.

Q. What did he say with relation to obtaining the garment contracts?

A. He assured us that he could obtain them.

Q. Did he say how?

A. Not in detail; just assured us that he could obtain them.

The Court: How? What did he say?

The Witness: He said because of his connections down [fol. 310] there he felt that the people down there would assure him—would see that he got the contracts.

Q. At any of these meetings was there some discussion about how the contracts were to be handled by Bonita?

A. That Marvin Rubin would handle them completely after we had agreed on a minimum price. The rest was entirely up to him.

Q. Well, what do you mean "he would handle them completely"? What did he say about it?

A. Basically, he would have final say as to the price that Bonita was prepared to take the contract for, over this minimum, as I say, and he would make all arrangements, negotiations would be—take care of every detail.

By the Court:

Q. Let me see if I understand you. You mean Bonita would give a minimum price that they must have to complete the work?

A. That's right.

Q. From that point on Rubin would take over and negotiate a price.

A. A price.

[fol. 311] Q. Which in no event would be less than that fixed by Bonita, but might be more.

A. That's right.

Mr. Gould: If your Honor please, may I call attention to the fact that your Honor used the word "negotiate," and I respectfully suggest that all the contracts that are under discussion here are contracts which were let out for public bidding.

The Court: All right, eliminate the word "negotiate." He would fix the price.

Mr. Sullivan: If the Court please, Mr. Rubin couldn't fix the price. The price was fixed in the bid and the bid was a low price bid.

The Court: I know all about it. He would fix the price for which Bonita would submit the bid. I think it was clear. I think everybody understood it.

By Mr. Christy:

Q. Was there some discussion at these meetings about samples?

A. Yes, you had to have a sample to know what you were bidding on.

Q. And what was done about these samples? What did Rubin do about it?

[fol. 311-a] A. He would obtain them or direct us to obtain a sample, and the sample was submitted to this engineering firm of Capelin Associates.

The Court: Who?

The Witness: Capelin Associates.

The Court: Spell that.

The Witness: C-a-p-e-l-i-n Associates.

[fol. 312] Q. That was the industrial engineering firm you referred to a minute ago?

A. Yes. The sample would be submitted to them and they would analyze all garments to see how much it would cost to make up, as near as it could be predetermined, and a price was then put on it, because actually Bonita, never having made the garment, had to go to some expert to know whether they could make it at a price.

Q. Then did Bonita reject certain samples?

A. Yes, there were several samples, garments, rejected

through Capelin who advised us that it couldn't be made profitably in the plant in Mayaguez.

Q. At any of these meetings which you have referred to, Mr. Carlin, was there any discussion about expenses?

A. Mr. Rubin indicated that he would incur expenses in obtaining the Government work.

Q. Did he say what these expenses were for?

A. Yes. He said they were to return favors that might be extended to him at 16th Street.

Q. Did he say anything else about it?

A. I do not know what you mean.

Q. Is that all he said, to return favors?

[fol. 313] A. I think so.

Q. Was there any discussion about what it would cost or what these expenses would amount to?

A. There were discussions about that, and Rubin assured us that they would not get out of hand, he would exercise some control over them, and that was basically the thought because it couldn't be fixed exactly, we wanted to be sure that we were not getting into a thing that we couldn't afford.

Q. Was any figure mentioned?

A. There were figures mentioned, I recall, because as a representative of management I personally translated them into terms of a salesman's commission, and there were some—the thought that came through to our mind, the expenses might run about 5 per cent of the contract price.

Q. At this meeting at which the expenses were discussed, who was present?

A. Ades, Levy, Rubin and myself.

Q. During the course of these conversations did Rubin ever mention any names?

A. You mean names of people that he might know down in 16th Street?

Q. Yes.

A. I recall the names, two names particularly, there [fol. 314] might have been others, two names I do remember, Major Farnell and Mella Hort.

Q. In what reference did he use these names?

A. That he knew them from 16th Street.

Q. Did he say anything else about them?

A. Generally that he knew them well.

Q. Did he say that they—

Mr. Spar: Excuse me.

Your Honor, would you ask the witness to fix the date of that conversation?

The Court: Can you fix the date, as best you can, of that conversation?

The Witness: There were many conversations and they took place prior to the letting of the contract and subsequent to my introducing Rubin to the firm which has a relatively short span of time altogether; these half dozen conversations took place over approximately a 60-day interval.

The Court: Well, that is right. When did these 60 days begin and when did you say they ended, approximately?

The Witness: I would say between April 15th and June 15th.

The Court: 1952?

[fol. 315] The Witness: 1952, yes.

Q. Now, Mr. Carlin, there was an agreement reached on this Government work, that Bonita was to work?

A. Agreement? I don't understand.

Q. Was there an agreement between Rubin and Levy?

A. There was this profit-sharing agreement.

Q. After they had entered into this did Rubin bring certain samples down to Bonita?

A. He either brought them or asked that we obtain them.

Q. At the time he would bring the samples was there any discussion, did you have any conversations with Mr. Rubin about the contracts?

A. There wasn't much discussion about the contracts. I mean, if the garment was rejected there was no need to go further into the contract.

Q. Was anything said about obtaining the contracts?

A. Rubin continually assured us that when we had decided on the garment that he could obtain the contract for that garment.

Q. Did there come a time when Bonita bid on certain items?

[fol. 316] A. Yes.

Q. Do you recall what those items were?

A. They bid on—they finally bid on a garrison cap.

Q. And did Bonita receive these awards on these contracts?

A. They did.

Q. As an accountant for Bonita, Mr. Carlin, you were, were you not, familiar with the books of account of Bonita?

A. Yes.

Q. And in your position as accountant you had occasion to look at the checks, to post the checks and in general keep the books, is that correct?

A. Well, not keep the books. Examine the books, audit the books.

Q. Mr. Carlin, I show you Government's Exhibit 33 for identification and ask you if you have seen that before?

A. Yes, I have.

Q. Just tell us generally what it is.

A. It is a check drawn by Bonita on the Public National Bank, dated June 13, 1952, to the order of Leon Levy for $1,000, signed by Ades and Levy.

[fol. 317] Q. Did you come across this check in connection with your accounting duties?

A. Yes, I did.

Q. Are you familiar with the signature of Leon Levy and Maurice Ades?

A. Yes.

Q. Does that appear to be their signatures on that check?

A. It does.

Q. Do you recall something particular about this check?

The Court: What is the date of it, please?

The Witness: June 13, '52.

A. The entry covering this check in the cash disbursements book of Bonita was not classified by the bookkeeper. If a check were drawn to "rent," the bookkeeper would mark it "rent." If the check were drawn to "telephone" the bookkeeper would indicate "telephone."

There was no indication of what this was for on the books.

Q. What did you do about that?

A. I naturally had to ask what it was for of the book-
[fol. 318] keeper. She couldn't answer.

Mr. Sullivan: If the Court please, might I have the name of the bookkeeper to identify who the bookkeeper is?

The Court: All right. Give it.

The Witness: I don't recall the name of the bookkeeper. I don't think I see her here.

Q. You don't recall the name?

A. It is a Ruth something. Wasn't it Ruth?

Q. Do you recall what her name was?

A. I don't remember.

Q. And after you talked to the bookkeeper, whom did you talk to about the check?

A. I talked to Rubin and Levy.

Q. And what did Rubin tell you about the check?

A. That it was part of the expenses, that it was to pay him for expenses that he had incurred down in 16th Street.

Mr. Christy: I offer Government's Exhibit 33 for identification in evidence.

Mr. Rossi: If your Honor please, at this time I should like to object on behalf of the defendant Ades to the materiality and relevancy of this check.

The Court: Overruled.

[fol. 319] Mr. Gould: If your Honor please, I object to the document on behalf of the defendant Levy. I think that it is appropriate for me to point out to your Honor in connection with this objection that the two contracts of June, 1952, are contracts where the contracting officer was Major Farnell, who is not on trial.

The Court: What is the ground for the objection?

Mr. Gould: That it is not binding on any of the defendants and it relates to a completely different transaction than the one outlined in the indictment.

The Court: Overruled.

Mr. Sullivan: May I see that, please?

(Mr. Christy hands to Mr. Sullivan.)

Mr. Sullivan: If the Court please, I object to the admission of this check in evidence on the ground that it

obviously is not binding on the defendant Rubin because his name is not mentioned anywhere. Leon Levy cashed a thousand-dollar check, apparently.

The Court: Overruled.

Mr. Sullivan: If your Honor please—

The Court: I don't want any detailed discussion. You have made your objection and I understand it.

[fol. 320] Mr. Sullivan: If your Honor please, I have one other—

The Court: I don't want speeches in the presence of the jury on this.

Mr. Sullivan: May I say one last thing about the—

The Court: Go ahead, one last thing.

Mr. Sullivan: I object on the grounds that Mr. Levy is not a co-conspirator or named in the indictment, and under those circumstances I think it is also objectionable.

The Court: Overruled.

Mr. Treiman: I raise the objection, if your Honor please, on behalf of the defendant Wool on the ground that the stipulation entered into indicates that the defendant Wool came into the picture around September 12, 1952. Certainly this is in no way binding upon the defendant Wool.

The Court: I have made my direction at the early part of the trial. I took it subject to connection as to those defendants who as yet, at this time, haven't been established to be a part of the conspiracy, subject to connecting them with the conspiracy.

[fol. 321] Mr. Spar: If your Honor please, on behalf of the defendant Hort I make the same objection.

The Court: Overruled.

Mr. Spar: With the understanding that your Honor will make the same ruling.

The Court: For Mr. Pollack, no objection.

(Government's Exhibit 33 for identification received in evidence.)

Mr. Spar: Mr. Christy, may I inquire of you, sir, have you offered any other exhibits for identification beyond 21?

Mr. Christy: I have had a great many exhibits marked for identification, Mr. Spar.

Mr. Spar: Because my list goes to 21.

The Clerk: Exhibits 22 through 64 were marked for identification.

The Court: Show it to the jury.

Mr. Christy: I think, your Honor, I will withhold showing it to the jury until later on, if I may.

The Court: All right.

By Mr. Christy:

Q. Mr. Carlin, to go back a minute, prior to the time that [fol. 322] you had the meeting in Bonita, the first meeting in Bonita with Marvin Rubin and Leon Levy and Maurice Ades, had there been any discussion about obtaining Government contracts?

A. No.

Q. I think you testified, Mr. Carlin, that while you were the accountant you worked on the books of Bonita generally?

A. Yes.

Q. I show you Government's exhibit 22 for identification and ask you what that is.

A. It is a cash disbursements journal.

Q. And you worked on that, did you?

A. Yes.

Q. I show you Government's Exhibit 23 for identification and ask you if you will tell us what that is.

A. This is a petty cash journal, and I worked on this book.

Q. I show you Government's Exhibit 24 for identification and ask you if you will tell us what that is.

A. It is the general ledger of Bonita Originals, and I worked on that.

Q. I show you Government's Exhibit 26 for identification [fol. 323] and ask you if you will tell us what that is.

A. Accounts payable ledger of Bonita.

Q. Did you work on that book, sir?

A. My handwriting doesn't appear in it, but I recall working with it when I was here.

Q. I show you Government's Exhibit 27 for identification, and ask you if you will tell us what that is?

A. This is the cash receipts book of Bonita Originals and it is also a purchase book of Bonita.

Q. Did you work on that?

A. I did.

Q. Now I show you, finally, Government's Exhibit 28 for identification and ask you if you will tell us what that is.

A. It is the purchase book and cash receipts book of Bonita, and I worked on it.

Q. I do have one more, Mr. Carlin. I show you Government's Exhibit 29 for identification and ask you if you will tell us what that is.

A. It is the general journal of Bonita, and I worked on it.

Q. Were these books which you have just identified the [fol. 324] books kept by Bonita in the regular course of its business?

A. Yes.

Q. And was it the regular course of Bonita's business to keep such books?

A. Yes.

Mr. Christy: Your Honor, at this time the Government would offer into evidence Government's Exhibits 22, 23, 24, 26, 27, 28 and 29 for identification.

The Court: Any objection, gentlemen?

Mr. Gould: The same objection with respect to the defendant Levy, they are not binding on him.

The Court: If that is the only objection, the same ruling.

Mr. Treiman: Did I understand your Honor is now making the same ruling for all the defendants?

The Court: If your objection is based upon the same grounds that you made before, I am making the same ruling, that is correct.

Mr. Treiman: Yes, it is.

(Government's Exhibits 22, 23, 24, 26, 27, 28 and 29 for identification received in evidence.)

Q. Mr. Carlin, I show you Government's Exhibit 33 in [fol. 325] evidence and Government's Exhibit 22 in evidence and Government's Exhibit—

Mr. Carroll: I am sorry, your Honor, but I can't hear him.

The Court: I think you had better speak up.

Q. On Government's Exhibit 22, Mr. Carlin, I call your attention to page 106, that is the cash disbursements book. Is that check, Government's Exhibit 33 in evidence, reflected in the cash disbursements book?

A. It is.

Q. Does it indicate there how it is charged?

A. As I mentioned before, there is no description by the bookkeeper of what the item is.

Q. I show you Government's Exhibit 24 in evidence, which is the general ledger, and I call your attention to page 44 and ask you if the check, Government's Exhibit 33, is reflected on that page?

A. Yes, it is.

Q. How is that page headed?

A. Entertainment.

Q. In other words, that check, Government's Exhibit 33 in evidence, was charged to entertainment, is that correct?

[fol. 326] A. That is right.

The Court: Was there any formal written agreement worked out with Rubin?

The Witness: They had worked out a written agreement, but as I recall it was never signed, one of these things they never just got to in my time with the firm.

The Court: Go ahead.

Q. Mr. Carlin, on Government's Exhibit No. 22 in evidence, I call your attention to page 116. This is the cash disbursements book. Does this lefthand column on page 116 indicate the names of the persons to whom checks were drawn?

A. That is correct.

Q. More specifically I call your attention to the date November 7th, 1952, and I ask you if it appears from that book that on November 7, 1952, a check was drawn to the order of Marvin Rubin in the amount of $247.65.

A. The cash disbursements book reflects that.

The Court: Speak up, please.

The Witness: The cash disbursements book reflects just as you have stated.

[fol. 327] The Court: What is that now again? November 17th?

The Witness: November 7th.
The Court: November 7th.
The Witness: November 7, 1952.
The Court: Yes. What is the amount?
The Witness: $247.65.
The Court: And what is it charged to?
Mr. Christy: He has not testified as to how it is charged, your Honor. We will take care of that later.
The Court: All right.

Q. Mr. Carlin, did you ever have any discussions, conversations, with Marvin Rubin about inspectors on the Bonita contracts?
A. Mr. Rubin indicated that he could exercise some control over what—which inspector might be sent down to examine the work while it was being made.
Q. Now contracts were awarded on June 11th and June 12th, 1952. When in relation to that date, sir, did you have these discussions that you have just referred to?
A. Prior and after.
[fol. 328] Q. In other words, before the contract was awarded and afterwards?
A. Yes.
Q. Do you recall Mr. Rubin mentioning any one inspector?
A. I recall the name of one inspector.
Q. What was that name?
A. That name was Ienni.
Q. Do you recall his first name?
A. No, I do not.
Q. Will you tell us what Mr. Rubin said about Ienni.
A. When we learned that Ienni was to be the examiner for the contract Rubin stated that the man had worked as an inspector on another contract that Rubin had had with another manufacturer.
[fol. 329] Q. Did he say anything else about Ienni?
A. Only that was pleased to find him on the contract.
Q. That is, on the Bonita contract?
A. Yes.
Q. Did you have any discussions with Rubin about deviations of Bonita?
A. Yes.

Q. What were those conversations, as best you recall?

A. If it would be necessary to obtain minor deviations, he could very likely obtain them.

Q. Did an occasion arise when there was a deviation?

A. Yes.

Q. Will you tell us about that?

A. Well, I recall one particular time, it was technical in nature, when garments were made, caps in particular, the cloth is shaded; in order that you shouldn't have two different kinds of shades on one hat, the Government requires that each ply be carefully marked, so that the band wouldn't be a different shade than the crown of the hat, or something like that. In the processing—in the manu- [fol. 330] facturing of these caps, Bonita learned that it could keep the plies separated, that is, the shades separated, without marking them, by making sure they were processed exactly in the order in which the goods were cut, and we obtained a deviation to manufacture in that fashion.

Q. Did you ever have any conversations with Rubin about the extension on deliveries?

A. Yes.

Q. What did he say to you?

A. Well, there were times when it became necessary to obtain extensions; we weren't able to meet delivery dates, and Mr. Rubin obtained extensions of these delivery dates.

Q. Prior to the time he had obtained the extensions, you had talked to him about the extensions and what had he said to you?

A. Well, this was one of the minor deviations that he felt he could obtain if needed.

Mr. Christy: You may inquire.

Mr. Gould: Mr. Christy, may we have the cash disbursement book? I don't remember what number you gave it.

Mr. Christy: You mean the page that I referred to?

[fol. 331] Mr. Gould: Yes.

Cross examination.

By Mr. Gould:

Q. Mr. Carlin, while you were connected with Bonita, you had nothing to do, did you, with Mr. Harry Lev?

A. No, I did not.
Q. His name wasn't mentioned in any way?
A. No, sir.

By the Court:

Q. When did you sever your connection with Bonita?
A. October of 1952.
Q. October of 1952?
A. Yes.
Q. Then how long were you employed by them altogether?
A. About nine months.

The Court: I understand.

By Mr. Gould:

Q. You first went to work for them in the beginning of 1952, in January; is that correct?
A. No, I said about March 1st.
Q. March 1st. Then you worked for them until some [fol. 332] time in June or July; isn't that right?
A. Yes.
Q. Then you went back to work for them in October of '52?
A. That's right.
Q. And you said you worked for them for about six weeks, from October 1952. So you were in error, were you not, when you responded to his Honor just now that you severed your connection with them in October of '52?

Mr. Christy: I don't think he was in error, sir.

A. I don't think so. There might be a gap of 30 days, but I would like to straighten the record, if it is important; nail it down a little closer.

The Court: Yes, what is it? You say you want to straighten the record.
The Witness: Well, I am just a little confused here. I would like to fix the date
The Court: Well, now, is it a fact that you went back to work in October, 1952?

The Witness: It might have been September.
The Court: Might have been September. And at any rate, how long did that last employment last?
[fol. 333] The Witness: Approximately six weeks.
The Court: Very well. All right.

By Mr. Gould:

Q. And was that the end of your relationship with them, when those six weeks expired, sir?
A. Yes.
Q. You had nothing further to do with the company?
A. Except that they owed me money and continued to pay me until—that was my only connection.
Q. And during that period, until you left, Mr. Lev had nothing whatever to do, as far as you know, with any of the transactions that you have described?
A. That is correct.

Mr. Gould: I have no further questions.
The Court: Mr. Sullivan?
Mr. Sullivan: If the Court please, I wonder if your Honor would permit a temporary suspension for the next five or ten minutes, so that I could discuss something with my client?
The Court: All right, we will take our mid-morning recess.
[fol. 334] (Short recess.)
The Court: Go ahead, Mr. Sullivan.

Cross examination.

By Mr. Sullivan:

Q. Mr. Carlin, you were first recommended to Bonita by whom?
A. By Capelin Associates.
Q. How do you spell Capelin again?
A. C-a-p-e-l-i-n.
Q. Is that the name of an individual who owns the company?
A. Yes.

Q. What is the name of Mr. Capelin?

A. Stanley Capelin.

Q. Was it Stanley Capelin who recommended you to Mr. Levy?

A. To Ades and Levy.

Q. Both Ades and Levy. Had Capelin Associates done some engineering work for Levy and Ades prior to your being introduced?

A. No.

Q. Mr. Carlin, the Capelin of Capelin Associates is your brother, is he?

A. He is.

Q. When you were introduced to Mr. Ades and Mr. Levy, [fol. 335] do you recall whether or not you were identified as a brother of Mr. Capelin?

A. I do not recall.

Q. Did you at any time volunteer to Mr. Levy that you were in fact Mr. Capelin's brother?

A. I don't recall whether I did that or not. I know that they knew me as his brother.

Q. You say that Mr. Levy knew you as his brother, knew you as Mr. Capelin's brother?

A. It was never denied.

The Court: He said, "they"; he didn't say "Mr. Levy."

Q. Did Mr. Ades know you as Mr. Capelin's brother?

A. I don't know at which point they knew me, but certainly it was known that I was a brother.

Q. Mr. Carlin, isn't it a fact that it was long after these transactions that took place that finally your identity as Mr. Capelin's brother was disclosed to Mr. Levy?

The Court: May I ask what is the materiality of this?

Mr. Sullivan: I am leading up to a point, if the Court please.

[fol. 336] The Court: Will you make the point? You have spent five minutes on Capelin, and I don't see that they have anything really to do with the case.

Q. Mr. Carlin, was a great deal of money, or was any sum of money of any substantial amount ever owed to Capelin Associates by Levy and Ades, or Bonita Originals?

A. After they began, after they had—when the contract

was left finally, they engaged Capelin to do engineering work at the plant, and as a result of that engagement moneys were owed.

Q. When you returned to the employ of Bonita Originals in July of 1952, I believe it was?

A. Yes.

Q. Was your re-employment effected at the insistence of your brother?

A. That's right.

Mr. Christy: Just a minute, your Honor. He returned in September or October, I think, not July.

The Court: All right.

The Witness: That is correct.

Q. Well, then in September or October your re-
[fol. 337] employment was effected at the insistence of your brother?

A. That's right. I wouldn't say "insistence." He didn't have the right to insist. He asked them.

Q. Did he tell them that he wouldn't go ahead with his work and would institute an action on his bill if you weren't re-employed?

A. I don't know what he told them.

Q. Mr. Carlin, have you had any experience in doing accounting work for Government contractors other than Bonita?

A. Yes.

Q. In the course of your work for other contractors, have you ever had occasion to observe that deviations were sought by the contractors and granted by the Government?

Mr. Christy: Objection, your Honor.

The Court: Overruled.

A. I actually had no intimate experience which could—which I could say yes to that statement.

Q. Mr. Carlin, could you tell us whether or not you recall that extensions of time, extension of time on deliveries was sought and granted to other contractors whom you worked for?

[fol. 338] A. I had no such experience.

Q. Mr. Carlin, did you have anything to do with making

up the bid on the Bonita Originals' contract, the first contract?

A. To my recollection, no.

Q. Prior to the awarding of the garrison caps, Bonita, as I understand your testimony, Bonita, Mr. Ades and Mr. Levy, examined other possible Government jobs to do?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Have you any idea approximately how many there might have been?

A. About three, I would say.

Q. As I remember, you stated that they didn't go ahead with making bids because they felt that they couldn't make the garment, any particular garment, profitably.

A. That's right.

Q. Did Mr. Rubin, on any of these other garments, make any statement that he could get the bid at a profitable price?

A. I don't quite understand what you are asking.

[fol. 339] Q. On the garments, where it was decided that you wouldn't make a bid, will you tell us how you arrived at the conclusion that a profit couldn't be made?

A. We, through Capelin, we endeavored to find out what it would cost, or whether we had the necessary machinery to manufacture the garment at all, because we need certain special machines that the contract—the manufacturing plant, which was the Maurice Embroidery Works, whether they had such equipment; whether we would have to retool or buy a lot of machinery, and it didn't make sense to make a garment under those circumstances.

Q. You knew, did you not, Mr. Carlin, that in each one of these possible Government bids it was to be secret competitive bidding; is that correct?

A. It was my understanding that that was the way the contracts were made.

Q. Have you ever had any experience in making up bids for other contractors.

A. No, I have not.

Q. Do I understand your testimony, Mr. Carlin, that after the securing and the awarding of the garrison hat

[fol. 340] contract, that Mr. Rubin told you he was overjoyed that the inspector was going to be Ienni?

A. I didn't say "overjoyed." I said, "pleased."

Q. He was pleased. Could you fix the time of that conversation for me as accurately as you possibly can, when he said he was pleased that Ienni was going to be the inspector?

A. Well, that would be—that would be perhaps a week before Ienni actually went down there.

Q. Is that the first time that any inspection was necessary to be made on the item, on the garrison cap?

A. No. There had to be an inspector from the very inception of the contract, and Ienni, to my recollection, was not the first inspector on this contract.

Q. So that you recall an inspector by the name of Forcillo; do you remember that name?

A. I don't.

Q. Mr. Carlin, when is the first time that you gave a statement to any Government agency concerning the events [fol. 341] that you testified to here this morning?

Mr. Christy: I object to that, your Honor. I don't think it is relevant. He hasn't shown any foundation to ask such a question.

The Court: Overruled.

A. I recall the circumstance. I can't recall the time.

Q. Tell us the circumstances, Mr. Carlin?

A. I received a call from Government agency, saying that they wanted to see me at my office.

The Court: Do you remember which agency it was?

Q. At what time, sir?

A. I don't remember that name. I—it developed later that these—I learned later that these gentlemen from the Government were—the first contacts I had was what was later to be the hearings held in Washington.

The Court: Senate investigators?

The Witness: Yes, they represented the Senate Committee; that's right.

Q. Could you tell us approximately when these gentlemen called you and came to meet you?

[fol. 342] A. I don't recall the years and months, but perhaps six months before those nearings were held in Washington.

Q. Would the names Poole and Balaban—

A. Balaban definitely and—yes, Poole and Balaban were the gentlemen who—

Q. Did these Government officials come to your office?

A. Yes, they did.

Q. Where was your office then?

A. 11 West 42nd Street.

Q. Did you give a statement concerning these events to those Government officials?

A. I did.

Q. You signed a statement?

A. I believe I did.

Mr. Sullivan: If the Court please, I ask for the production of that statement.

Mr. Christy: No proper foundation for that, your Honor.

The Court: I don't think you have laid any foundation merely by asking if a statement was given.

Mr. Sullivan: What was your ruling, if your Honor [fol. 343] please?

The Court: I don't think you have laid sufficient foundation for the production of the statement?

Mr. Sullivan: I would ask the Court to look at the statement to see if there are any inconsistencies?

The Court: I don't think you have even laid a foundation for that.

Q. Mr. Carlin, did you tell the Government officials on that occasion anything different than what you have testified to here this morning, that you can remember?

A. Nothing that I can—nothing different that I can remember.

Q. Mr. Carlin, when you made a notation in the general ledger—

The Court: I want to get one thing clear, and if I am in error I want to be corrected.

I have been re-reading the indictment. There has been much reference here on cross-examination to this matter of "closed bids" and "sealed bids" and so forth. The Government does not charge, as I see in the indictment,

that any of the co-conspirators fraudulently obtained the [fol. 344] contracts, but as I read the indictment it says, "For the purpose of inducing them to corruptly disclose confidential information prior to the awarding of Government contracts, which information would enable said defendants to be low bidders on said contracts."

In other words, I take it from that you ask that the inference be drawn then that the contract was obtained illegally, by reason of this information being given in advance; is that your contention?

Mr. Christy: Yes, your Honor.

The Court: In other words, you still agree that it went to the low bidder, but it is your contention that they became low bidders by reason of this advance information.

Mr. Christy: Not necessarily, your Honor. We haven't made that claim. We make the statement that they received advance information, which they were not entitled to.

The Court: That is correct. That is what you say in the indictment.

Mr. Christy: That is right.

The Court: "Which information," you go on to say, [fol. 345] "would enable said defendants to be low bidders on said contracts."

Then you also charge that they would all be induced to corruptly grant deviations in the specifications.

Mr. Christy: That is correct.

The Court: Step No. 2.

Mr. Christy: That's right.

The Court: Then third, as I see it, the third step, they would give money and other things for the purpose of influencing the decisions of the employees on actions and matters pending before said clothing inspectors in their official capacity.

Mr. Christy: That is correct.

The Court: Those are substantially the three steps; isn't that correct?

Mr. Christy: That's right.

The Court: The point I want to make clear is that there has been constant reference, and I want to get this clear in my mind as well as the jury's, that there is no contention on your part that the contracts were awarded to other than a low bidder.

Mr. Christy: That is correct, your Honor.

The Court: But you claim that they became low bidders [fol. 346] and that these other acts were carried out through the conspiracy.

Mr. Christy: That is correct. We don't make the contention that they actually opened the sealed bids and looked at them.

The Court: I understand. I just wanted to make that clear.

All right.

Mr. Sullivan: May I have the exhibit which indicates that this thousand dollar check was—

Q. Mr. Carlin, I show you Government's Exhibit—I don't know what the number of it is—24—and ask you to look at account No. 44, headed "Entertainment."

A. Yes.

Q. If I understand your testimony, did you put this thousand dollar check under the item, under the category of "Entertainment"?

A. I did.

Mr. Treiman: I am sorry. I didn't understand that answer.

A. I did.

The Court: He said he did.

After talking to whom?

[fol. 347] Q. Did you—

The Court: After talking to whom?

The Witness: After talking to Rubin and Levy.

Q. Did you tell Mr. Poole and Mr. Balaban on your meeting with them the first time the Government agents talked to you that you had put that check under the category of "Entertainment"?

A. I posted it, yes.

Q. You posted it in the books yourself?

A. Yes, I posted it myself.

Q. Now, did you tell Mr. Poole and Mr. Balaban that it was you who posted it under the category "Entertainment"?

A. I don't know whether I did or didn't. It is in my hand-

writing. If they asked me, I must have surely said that I did.

Q. When you posted that thousand dollars under the category "Entertainment," had you looked at the checkbook of Bonita Originals, from which this check had been taken?

A. Yes.

Mr. Sullivan: Do you have that checkbook, Mr. Christy?

[fol. 348] Mr. Perrotta: You have the stub in your hand.

Mr. Sullivan: Do you concede that is the stub from that checkbook?

Mr. Perrotta: I gave it to you.

Mr. Christy: Yes, I will concede. Do you want to mark it for identification?

Mr. Sullivan: Well, without marking it for identification, if the Court please, I'd like to offer in evidence this stub from the Bonita Originals checkbook, reflecting the thousand dollar check which has been admitted in evidence as check No. 2213, dated June 13, 1952.

The Court: Any objection?

Mr. Christy: Government has no objection to it, your Honor. I don't know that it is relevant.

The Court: All right, let's receive it.

(Defendants' Exhibit A received in evidence.)

The Court: All right.

Let's move along if we can, Mr. Sullivan.

Mr. Sullivan: Yes, Judge. I am sorry.

By Mr. Sullivan:

Q. Mr. Carlin, when you made the entry of one thou-

[fol. 349] sand dollars, did you observe that checkbook which said that the check 2213 was an exchange?

A. I did.

May I hold it a moment, please?

Q. Yes.

A. I would like to—

Q. Just let me have the document, please.

A. I would like to withdraw that, what I just said. I am not entirely familiar with what was on the check stub at the time it was drawn, at the time I made the entry.

[fol. 350] Mr. Sullivan: I would like, if the Court please, to call it to the attention of the jury and show them the stub for Government's Exhibit 33, a thousand dollar check has on the stub "Exchange," not "Entertainment."

The Court: Don't make that type of statement. Now, Mr. Sullivan, if you want leave, first ask and then, after we grant you permission, show it to the jury. But while you are asking for it to show it to the jury or making a gratuitous statement.

Mr. Sullivan: It was unintentional. If your Honor please, I am sorry I did that. But I don't think it is gratuitous and it certainly couldn't be with any intention.

The Court: Go on.

Q. Now, Mr. Carlin, I show you Government's Exhibit 22 and I call your attention on page 107 to check 2170 in the sum of $1,000 and ask you can you tell this Court and jury now what that check is?

Mr. Christy: I object to that, your Honor, as certainly beyond the scope of direct.

The Court: Why? It is another check?

Mr. Christy: I presume so. I don't know anything about [fol. 351] this check, your Honor.

The Court: I am asking you, is it another check?

Mr. Christy: It must be, your Honor.

The Court: All right. If it is another check, I sustain the objection.

Q. Mr. Carlin, did you ask the bookkeeper and the officials of Bonita Originals for explanations of some of these items which are on pages 106 and 107?

Mr. Christy: I object to that, your Honor, also.

The Court: Overruled.

Did you?

The Witness: Yes, I asked.

Q. Now did you ask them for an explanation of the thousand dollar check?

A. The one that previously put in evidence?

The Court: 33 in evidence.

Q. Yes.

A. Yes.

Q. Did you ask them for any explanation of check No. 2170 for a thousand dollars in the same month of 1952?

Mr. Christy: I object to that, your Honor.

[fol. 352] The Court: That is overruled.

Did you?

The Witness: Yes.

The Court: All right.

Q. Now, Mr. Carlin—

The Court: In what instances would you ask for an explanation? Let us get right to it.

The Witness: If the bookkeeper failed to classify an item I would have to ask further what it was.

The Court: And by that you mean, failed to classify it in the books of the company as distinguished from the stub of the checkbook?

The Witness: That is right.

The Court: As auditor you went to the books of the company to look for a classification?

The Witness: The books, the records, the bookkeeper, and if I failed to get some answer there then I would have to go to the officers.

Q. Will you tell us what classification the check that I have just called No. 2170 for a thousand dollars payable to Leon Levy, what classification that was put under in the books of the company?

[fol. 353] A. It was shown as a charge to Leon Levy.

The Court: That wasn't charged to entertainment?

The Witness: No.

Q. Now, Mr. Carlin, did you observe, in checking through the checks of Bonita in June, well, April, June or—April, May and June whether there were frequent or a number of inscriptions categorizing checks as exchanges?

A. There were such checks.

Q. Did you ask for any explanation of what those inscriptions meant?

A. They very often required no explanation. Of cour I would ask where it wasn't apparent.

Q. Would you tell the Court and jury what an exchan would be?

A. Well, in this particular case Leon Levy, prior to an during the early part of my engagement, would lend mone to Bonita to help them financially. When he would put in it was termed an exchange, which in accounting termino ogy would be a temporary loan. And he subsequently en deavored to withdraw a like amount so the item woul wash itself out or be an exchange, the loan for a repay [fol. 354] ment. And the thought would be a relatively short interval.

Q. Was it usual for Mr. Levy to make advances to th corporation during that interval?

A. I said it wasn't unusual.

Q. Can you recall what bank account he drew the money to make the loans to Bonita Originals?

A. No, I do not.

Q. Can you recall whether Mr. Levy had a private personal bank account in addition to the Bonita Originals account?

A. I never actually knew of the existence of such an account.

Q. Can you tell us from looking at the books whether or not any of the exchanges which you have just testified to were paid into—the loans were paid into Bonita by way of checks or by way of cash?

A. To my knowledge whenever Leon Levy put money into the business it was by check.

The Court: Anything further?

Mr. Sullivan: I think that is about all, Judge.

The Court: All right. Well, can we go on?

[fol. 355] Mr. Sullivan: That is all, Judge.

Cross examination.

By Mr. Rossi:

Q. Mr. Carlin, you were pretty familiar with Bonita's operations during the period of time that you worked for them?

A. Yes.

Q. Could you explain to us where the factory of Bonita Originals was?

A. In Mayaguez, Puerto Rico.

Q. Who was in charge of that factory?

A. At the time I came into the firm, Mr. Ades' brother was in charge.

Q. And after Mr. Ades joined Mr. Levy in Bonita Originals?

A. Just a moment. Would you repeat that, please?

Q. After Mr. Ades and Mr. Levy became partners in Bonita Originals who was in charge of the factory in Puerto Rico?

A. Well, remember the date that they became partners prior to my becoming the accountant. When I came I found the condition that I spoke of, that Ades' brother was down at the factory.

Q. Yes. But shortly after that, in June, they obtained [fol. 356] these contracts, did they not?

A. Yes.

Q. When these contracts were to be serviced by doing the factory work, it was done in Puerto Rico?

A. The work was done in Puerto Rico, yes.

Q. None of the work was done in New York?

A. No.

Q. The man in charge of the Puerto Rico plant was whom?

A. Ades' brother.

Q. At the time the contracts were obtained?

A. That may not be so. I know that he left some time about that time, I don't know if it was before or after, but it was around that time.

Q. Perhaps I can refresh your recollection. Isn't it a fact that after these contracts were obtained by Bonita Originals that Mr. Maurice Ades went down to Puerto Rico to take charge of the factory operations for Bonita?

A. Well, whether to take charge or to assist, he went down to assist in—

Q. What I asked is, the operation, so far as Bonita Originals is concerned, was in Puerto Rico in this fac- [fol. 357] tory?

A. No, when I came into the firm he was more of a salesman and his brother ran the factory.

Q. We are talking about the period of time from June on, June 1952 on, when they obtained these Government contracts to make the garrison caps. You have already testified that these caps were made in Puerto Rico.

A. That is right.

Q. Isn't it a fact that Mr. Ades, Maurice Ades, not merely his brother, was in charge of the factory at Puerto Rico and that was his job, as far as these contracts were concerned?

A. Yes.

Q. All right. Now who ran the New York office?

A. It was originally run by Levy and Ades. After the Government contracts were let Levy was on the spot, he watched the New York office.

Q. In other words, Mr. Levy was in charge of the New York office of Bonita Originals and Mr. Ades was down in Puerto Rico in the factory?

A. After the contracts were let with the Government.

[fol. 358] Q. Yes, that is right. Now at this first meeting with Mr. Rubin and Mr. Levy and Mr. Ades, did any question come up about lower costs of production in obtaining the Government contracts?

A. I do not recall any specific conversation.

Q. Well, perhaps this would refresh your memory.

Isn't it a fact that Mr. Rubin told Mr. Levy and Mr. Ades that because labor was cheaper in Puerto Rico you could probably put in a lower bid on Government contracts than someone who had a factory right here in the States?

A. Yes.

Q. In other words, he felt, Rubin did, that you could obtain a contract or get a lower bid and, therefore, have a better chance to obtain a Government contract because of the lower labor cost in Puerto Rico?

A. That is true.

Q. Now in the area of filling out invitations for bid and seeing people down at 16th Street and the course of communication between the Government agency, and Bonita, who was in charge of that phase of the operation?

[fol. 359] A. Rubin.

Q. Rubin Did Mr. Ades do anything particularly active, or did he take an active part in that phase?

A. No.

Q. Who prepared the invitations to bid on these first two Government contracts?

A. My recollection, Rubin.

Q. Mr. Ades signed them, is that correct?

A. I don't recall the actual signature. It could very well be.

Q. Mr. Ades was the president of Bonita Originals, therefore in order to submit a bid isn't it a fact that an officer of Bonita had to sign the invitation to bid?

A. An officer had to sign, yes.

Q. And since he was president he was the logical person to sign?

A. Logical, yes.

Q. Although he actually had not prepared them.

A. No, he did not prepare them.

Q. Now you testified previously with regard to the ex- [fol. 360] penses that Mr. Rubin allegedly asked Levy and Ades to give him in connection with his activity on these Government contracts, is that correct?

A. Yes.

Q. You stated that Mr. Rubin said that he would need expenses to take care of Government people so that—

A. I don't know exactly the expression I used but it sounds correct.

Q. Isn't it a fact that Mr. Rubin did not draw a salary with Bonita after they started working on these Government contracts?

A. That is correct.

Q. In other words, when he came to Bonita and assured them that he would be of help in getting Government contracts he wasn't drawing a salary of any kind for this work?

A. That is right.

The Court: Did Rubin receive anything from Bonita by way of distribution of the one-third of the profits?

The Witness: There were no profits in my time.

[fol. 361] The Court: Oh, in your time. All right.

Q. Actually the understanding was that he was to b paid one-third of the profits at the end of the contract, isn' that true?

A. When the profits could be determined, which woul necessarily be at the end of the contract.

Q. Wasn't it possible for Mr. Rubin, being in a positio where he was working on this procuring of the Gover ment contracts for Bonita, and since he was without a salary from Bonita, might have gone to Levy and Ade and said, "I need some money for expenses, of my ow expenses"?

The Court: I will sustain that objection.

Q. Didn't he in fact do that?

A. For his personal expenses?

Q. In connection with his activity.

Mr. Christy: I object to that also, your Honor.

The Court: Do you know whether he ever went and sai he needed money for personal expenses, is the questio

The Witness: I know of no such instance.

The Court: Very well.

Q. In other words, you would have us believe that M [fol. 362] Rubin was operating in this area of obtainin Government contracts for Bonita without a salary an without demanding any expenses for himself from Lev and Ades?

A. That was precisely my understanding. Mr. Rubin wa —had a salary from another source at the time. We kne that.

Q. Now, would you say tha' Mr. Levy and Mr. Ades too a passive role, that is to say, a nonactive role, in the pro curing and directing of Government contracts for Bonita'

The Court: I will sustain that objection.

Q. Now with regard to Government's Exhibit 33, thi check for $1,000, it is a fact, is it not, and you have th exhibit before you, that a check for $1,000 drawn to th order of Mr. Levy was entered on the books on June 24t some 11 days after this first check which the Governmen has introduced?

A. There is a check for a thousand dollars drawn 11 days, thereabouts, after the Government exhibit check.

Q. And isn't it true from your examination of this cash disbursements book that there is no explanation in that book for this second check of June 24th?

[fol. 363] A. That is correct.

Q. In other words, this explanation was introduced somewhere else in the books of Bonita Originals, but not in this book?

A. That is right.

The Court: Where was that explanation for the second check?

The Witness: The fact that it is posted to the general ledger under the item of Leon Levy will explain that it—what the nature of the item is.

The Court: What would it mean to you?

The Witness: To me it would indicate that it is returning the moneys which Leon Levy had previously given to Bonita.

The Court: But that wasn't the course followed with respect to Exhibit 33, the June 13th check?

The Witness: No.

The Court: So that it was clear to you when you looked at the books that this wasn't an exchange transaction.

The Witness: Wait a minute.

[fol. 364] The Court: The June 13, 1952—

The Witness: Oh, yes, the June 13th check wasn't a—it was a—I was able to obtain an explanation that the June 13th check wasn't an exchange while the later one was an exchange.

The Court: And did you get any explanation with respect to the later one, an oral explanation?

The Witness: Yes.

The Court: From whom?

The Witness: From Levy.

The Court: From Levy. How about the first one, the June 13th, Exhibit 33, who gave you that explanation?

The Witness: I got that from Rubin and Levy.

By Mr. Rossi:

Q. But, as a matter of fact, the check stub for the first check dated June 13 carries the description "Exchange"?

A. It carries that legend.

Q. Although it is not so described in the cashbook?

A. That is right.

Q. And yet you say you were able to distinguish between these two $1,000 checks, one introduced by the Govern- [fol. 365] ment under date of June 13th with no explanation in the cashbook, and the other one on June 24th, you would have us believe that you remember that distinctly?

A. It not a question of remembering. I know what I did. This is a matter of record. And I wouldn't do what I did without obtaining an explanation. I wouldn't call "cash" "telephone."

Q. But there is no explanation on the ledger sheet?

A. No, but it isn't necessary to put an explanation in here if I have it in here. I know what such items are. When I get through my examination—

Q. Pardon me. If you are so sure that you know what each item was, why was this marked in exchange in fact when it was entered under entertainment, the June 13th check?

A. Because we have something carried—the label is no reason is no reason for me to accept that label, under the rather unusual circumstances where the bookkeeper having seen it marked "Exchange" doesn't make it "Exchange" in the cash disbursement book; there is a discrepancy that [fol. 366] I have to have explained to me.

Q. Would you examine now in the cash disbursement book with regard to this check of June 24, 1952 and will you notice the check number entered therein?

A. I see the number.

Q. Would you tell us what that number is?

A. 2170.

Q. Is that check number in order with the checks before it and after it?

A. No, it is not in numerical order.

Q. This check is inserted in the cashbook out of the regular order?

A. Yes.

Q. Isn't that somewhat unusual?

A. No, it happens often, in bookkeeping practice.

Q. The check that is out of order with the checks numbered before it and after it and which is identical in amount with the Government exhibit which was supposedly given, or cash, ten days before, eleven days before and which carries no explanation for it on the cashbook, can you find that situation not unusual?

A. You are relating it all together. I only said that it [fol. 367] is not unusual to have checks out of numerical order in the cashbook.

Q. I am relating all the facts relating to these checks, these two $1,000 checks in June 1952. These are the facts, are they not?

A. You have confused me.

Q. Well, I am confused.

A. I can only say as I said before, I obtained an explanation of each check and the way I have so classified them, one is a charge to Leon Levy and one as entertainment was the way it was explained to me at the time I made the examination and to the best of my knowledge and belief that is what they were and are.

Q. In view of your admission of your confusion with regard to these checks, isn't it possible—

The Court: No. He didn't say he was confused with respect to the checks.

Mr. Rossi: I am sorry. I retract it.

The Court: You asked him about usual and unusual, and you said you will get it confused.

Q. With regard to this first check where the stub shows that it was issued supposedly for exchange and where it is entered elsewhere as a charge to entertainment, and [fol. 368] where it is entered in the cashbook with no explanation whatsoever, isn't it possible that this first check of June 13, which is Government's Exhibit, was not in fact the one which you received an explanation for but rather the one of June 24 might have been that check?

A. I very much doubt if that is correct.

Q. But you are not positive?

A. I am certain at the time and I must have made ever effort to be certain.

The Court: Everything you said here today you ar positive of?

The Witness: I am positive that that first check wa explained to me as entertainment at the time and wa so used, and the second check was satisfactorily explaine to me, and I contend that it was a legitimate exchang as I have labeled it.

Q. Let us come down to this question of deviation. Ar I correct in assuming that you have testified that certai deviations arose during the course of these two contra obtained by Bonita?

A. Yes.

[fol. 369] Q. Will you tell us who took care of thes deviations, who attended to them?

A. Marvin Rubin.

Q. Did Mr. Ades have anything to do with taking car of or straightening out the deviations on these contracts?

A. I don't recall that he had anything to do with them

Q. Are you familiar with the practice that obtained in Bonita's with regard to the signing of the checks in June, 1952?

A. I think I am.

Q. You were with them until October, 1952, is that correct?

A. Well, there was a gap.

Q. Well, as far as you know, shortly after this June 13th check, 1952, wasn't it a fact that Mr. Levy alone signed checks for Bonita?

A. The check has two signatures.

Q. I know. I say shortly thereafter.

A. There was a time when we had to permit Leon Levy to sign alone, because it was awkward to get two signatures.

Q. Because this other man was down in Puerto Rico

[fol. 370] and you couldn't send checks down for signature?

A. That is right.

Q. So that shortly after Mr. Ades left for Puerto Rico Mr. Levy was in charge of the bank account and was signing checks?

A. That is correct.

Q. There was some previous testimony regarding these exchange transactions in the Bonita books. Would you explain to me exactly the mechanics of the typical exchange transaction, how it took place, what happened?

A. The corporation would have to issue certain checks for expenses which might be more money than they had in the bank. Mr. Levy might lend them a thousand dollars, fifteen hundred dollars from his personal funds. And he usually, immediately, took a check of a like amount at once which he held and redeposited it to his personal account as soon as funds became available in the corporation.

Q. In a situation of that kind, it was in effect a loan to the corporation by Mr. Levy?

A. It was in effect a short term loan.

Q. Yes. Why wasn't it entered on the books as a loan rather than an exchange?

[fol. 371] A. We used the terms interchangeably.

Q. I see. Now are you familiar with the fact that between the period of June 13, 1952 and October 9, 1952 there were some ten checks drawn to the order of Mr. Levy and marked to exchange?

A. I wasn't the accountant during that entire period. I don't know what checks were drawn to Levy.

Q. You brought Mr. Rubin in to meet Mr. Ades and Mr. Levy at the very beginning, isn't that a fact?

A. Yes.

Q. And at the time you brought him in it was your understanding that Mr. Rubin was looking for a factory in Puerto Rico, is that correct?

A. That is right.

[fol. 372] Q. So you thought to connect these people together so that they could perhaps salvage whatever business was left in Bonita Originals, is that correct?

A. Not a question of salvage.

Q. You testified previously that the business was in a precarious position, isn't that so?

A. They were in a precarious position when I became their accountant.

Q. And that was when?

A. March 1st, 1952.

Q. When was it that Mr. Rubin came into the picture?

A. April, May, 1952.

Q. Shortly thereafter, in other words?

A. Yes.

Q. In other words, it was your attempt as the accountant to bring in someone who might possibly help Mr. Levy and Mr. Ades in their business, which was in a precarious position?

A. You dwell on the word precarious. Their position had improved in the time I was with them. I introduced Rubin to assist—

Q. All I am asking, Mr. Carlin, is your motive in bringing these people together; that was your motive, was it [fol. 373] it?

A. To help create additional profits in the business. I thought that the influx of Government business or any business would serve to improve the financial status of the company.

Q. I don't want to belabor the point, but isn't it a fact that at the end of 1951 Bonita had lost considerable money?

A. That is true.

Q. And that they had very little money in the bank?

A. That is also true.

Q. So therefore the position was not what you would call strong or even average with regard to operating in this field of children's garments?

A. Their position was weak at the time Rubin came into the firm.

Q. That is what I meant by the word precarious. So you brought in Mr. Rubin with the hope and expectation that they would be able to do some—what? Business with the Government?

A. Yes. That the Government—the factory had excess capacity and we thought we might make Government work. [fol. 374] Q. Now at this first meeting was it your understanding that Mr. Rubin had undertaken to promise that they could get a Government contract immediately because of quote influence unquote on 16th Street?

A. Merely because?

Q. Yes.

A. I wish you would clarify that a little.

Q. Well, he didn't come in and say, "I can get these Government contracts and I can get them for one reason, that I know these people on 16th Street, that they will do me a favor"?

A. That was the primary statement he made.

The Court: Was that the primary purpose of the arrangement made between the parties?

The Witness: Oh, yes. Rubin was employed to obtain these Government contracts. That was his sole purpose.

Q. I am not questioning that point. We are questioning how he said he could get them. Didn't he say, as you had testified previously, that he thought they could get them because of the labor being cheaper in Puerto Rico; isn't that a fact? You have so testified. Well, you have, haven't you?

[fol. 375] A. Yes, I have.

Q. So then that wasn't the only reason that he could have mentioned at this meeting?

A. That is right. It wasn't the only reason.

The Court: What were the other reasons? Did you hear my question?

The Witness: I did. It is still a combination of the word. For one thing, Mr. Rubin felt that he could, he felt he could obtain the contracts. Another thing he wanted, he wanted the factory in Puerto Rico because it had a low cost and would enable him to put in a low bid which would tend to result in a greater profit than if made in the States.

The Court: Did he enlarge on how he knew he could get these contracts?

The Witness: Not specifically.

The Court: Did he in a general way?

The Witness: In a general way he merely assured us that he could obtain them.

The Court: By reason of what fact?

The Witness: The fact that he had intimate acquaintances at 16th Street that could help him obtain the contract.

Q. At this meeting did he mention that he would need [fol. 376] any specific amounts to pay these people on 16th Street?

A. He again stated that he would have expenses in connection with obtaining the work.

Q. Let me ask one final question. You had brought these people together, had you not?

A. Yes.

Q. You were there at their first meeting?

A. Yes.

Q. Was it your understanding that you were bringing together these people for the purpose of obtaining Government contracts by improper means?

Mr. Christy: I object to the question; it calls for a conclusion, your Honor.

The Court: I will overrule the objection.

Q. Well, was it?

A. No.

Mr. Rossi: No further questions, your Honor.

Mr. Treiman: I will pass at this time.

The Court: Anything further?

Cross examination.

By Mr. Spar:

Q. Mr. Carlin, sir, I represent the defendant Mella Hort. Would you say that as an accountant, as a business [fol. 377] man, that it is normal for a company that is having financial difficulty to seek new fields of endeavor if they have the machinery?

The Court: Oh, come on. These are such elementary matters.

Mr. Spar: All right.

The Court: Of course any company would seek new fields of endeavor and any company would try to get more business. The question here is whether or not it was lawful. Let us get to it.

Q. Now, Mr. Carlin, isn't it a fact that the first time that you heard the name of Mrs. Hort was by a telephone

call from her to you after the contract was given, when she introduced herself as a clerk employed by the Procurement Division of the Quartermaster Corps?

A. I don't recall that conversation at all.

Q. Did you have any conversations with Mrs. Hort after the contract was given?

A. I don't recall having any.

Q. Isn't it a fact, sir, that it was you who spoke to Mrs. Hort and told her that you were leaving the company and that all further transactions with the company should be with Mr. Rubin?

[fol. 378] A. I most certainly did not.

Q. Is it your testimony today, sir, that you never spoke to Mrs. Hort by telephone with relation to these contracts?

A. I don't recall speaking to Mrs. Mella Hort at any time for any reason.

Q. May I help refresh your recollection?

A. Certainly.

Q. Did she at any time call you in reference to some loyalty reports that were necessary in the files?

A. I don't think she did.

Q. Did she call you about anything routine that may have been in the file and introduced herself to you as an assistant to George Earnshaw of the Quartermaster Corps?

A. I recall no such conversation between Mella Hort and myself.

Q. Would you say you never spoke to her?

A. To the best of my knowledge I would say that—I might just elaborate further. She might have called me in a routine matter that was—that I just gave no thought to at the time, but I actually recall that I never spoke to Mella Hort.

Q. Is it possible that she may have called you and merely [fol. 379] stated that she was an assistant to Mr. Earnshaw at the Quartermaster Corps?

The Court: He says he doesn't remember.

A. I don't remember.

Q. Without giving the name, sir?

The Court: He says he doesn't remember.

A. I don't remember ever speaking to Mella Hort.

Q. Do you remember speaking to anybody in the Quartermaster Corps over the telephone before you left the employ of Bonita Originals in July, 1952, with reference to routine matters?

A. I would have no occasion to tell the Quartermaster Corps I wasn't an associate of Bonita, because they would have no knowledge that I was associated.

[fol. 380] Q. Well, sir, were you in the business plant or the office of Bonita Originals regularly during the months of June and July of 1952?

A. Not regularly. I used to come in once a week, more or less.

Q. Could it be more—

A. I wasn't—

Q. —than that?

A. I doubt it. Now remember, I was not employed by them. I am an independent accountant and came there on occasion.

Q. Now, sir, you testified this morning on direct examination that Mr. Rubin mentioned the name of Mella Hort to you.

A. At times to me.

Q. Well, was that before the contract was given or after the contract?

A. Before and after.

Q. In other words, if the contract was given on June, on June the 12th, is it your testimony that he mentioned her name to you before that date?

A. Yes.

Q. Do you recall testifying before the Senate approximately two years ago, in May of 1955?

[fol. 381] A. I recall.

Q. Was your memory good then?

A. Yes.

Q. Was it as good then as it is today?

A. Yes.

Q. May I call your attention—and I am reading from page 22 of the record—the following questions and answers:

Mr. Kennedy is speaking:

"He said he could obtain Government work, and did he say that he had the contact or knew the people and had the contacts in order to get Government work?"

And did you make the following answer:

"Yes, he did."

referring of course to Mr. Rubin.

A. You are reading, and I presume that is what I said at the time.

Q. Well, do you remember saying that, sir?

A. I don't remember that specifically.

Q. Although it is in the record of the Senate hearing?

A. I am not denying that I said it. I just don't remem-
[fol. 382] ber saying it.

Q. All right, sir. May I continue?

"Mr. Kennedy: And did you then bring Mr. Marvin Rubin to Mr. Ades and Mr. Levy and he then had a conference with those two individuals?"

And did you answer: "With myself present."?

A. If those are facts, I must have said that.

The Court: So far I don't see anything inconsistent.

Mr. Spar: I am leading to the question in one or two more, so that I don't take it out of context.

The Court: All right.

Q. "Mr. Kennedy: And you were present?"

And your answer: "Yes, sir."

Did you say that?

A. I was present at that meeting.

Q. Now by Mr. Kennedy:

"Did he explain that he could get Government work, and that he had the knowledge and the know-how, and had the contacts to get Government work?"

And did you answer: "He so stated"?

A. Yes.

Q. And was this question asked of you by Mr. Kennedy:
[fol. 383] "Did he at that time, that you can remember, did he mention any particular individuals that he knew through whom he would be able to secure these Government contracts?"

And did you answer, sir:

"If he mentioned names at that time, I wouldn't recall that he mentioned it at that time, because having heard the names for the first time, I don't think they would have stuck in my mind."

Did you make that statement, sir?
A. I made that statement at our—
Q. Did you, sir?

The Court: Go on.

A. (Continuing) —at our first meeting, which I said—the first meeting which I introduced the related parties.
Q. And that wasn't referring to any other meetings?
A. No.

By the Court:

Q. In other words, you are saying at the first meeting he did not mention the name; is that correct?
A. I say that they mentioned them. I wouldn't particularly remember the names.
[fol. 384] Q. Whether it was the first one?
A. As the result of that first meeting.
Q. But your statement today is that he did mention the name of Mella Hort before the award of the contract and after?
A. That's right.

By Mr. Spar:

Q. And you don't know the exact date of that, sir?
A. When he might have mentioned Mella Hort's name?
Q. Yes, sir.
A. I wouldn't know the exact date.
Q. How many meetings in all were you present with Mr. Ades and Mr. Rubin before any contract—and Mr. Levy before any contract was given?
A. I have stated about a half a dozen.
Q. And would you say that it was at that time?
A. It was during these dozen meetings that the names were mentioned.

Mr. Christy: Your Honor, may I direct counsel's attention to the bottom of page 23, and the top of page 24, in which I think Mr. Carlin explains his answer.
[fol. 385] Mr. Spar: If your Honor pleases, I think that is—

The Court: All right, you can take it up on redirect.

Q. Now, Mr. Witness, I ask you whether or not you made the following statement in response to the following questions—

Mr. Spar: And I am reading from pages 23 and 24, Mr. Christy.

Mr. Perrotta: Thank you.

Q. "Mr. Kennedy: Now, did he indicate to you and to Ades and Levy that there was no question but that he was going to get the contract that he bid on?"

And did you make the answer: "He made that very clear to us that he would get it."

A. I said that.

Q. "Did he indicate further that the reasons he was going to get these contracts was because of the contacts he had with ESTAPA?"

The Court: Did he answer?

Q. And your answer was: "Yes."

A. Well, I answered that question "Yes" at the time.

Q. Now I call to your attention, sir, that ESTAPA did [fol. 386] not come into existence until October 1, 1952, as conceded and agreed upon by all counsel in this case.

A. We are merely using the term "ASTAPA" to refer to 16th Street. The names were later used interchangeably. I didn't say it was ASTAPA. I used that term perhaps later.

Q. Well, isn't it a fact that there was no ASTAPA at all in April, May or June of 1952?

A. I do not know when ASTAPA came into existence.

Q. Now, may I continue, sir:

"Did he mention now during this period of time the people that he knew particularly well at ASTAPA?"

And did you answer, "There were two names that I recall that were mentioned many times, and so I have them fixed in mind."?

Did you say that, sir?

A. I said that I had them fixed in mind, yes.

Q. And that was referring to ASTAPA.

A. You dwell on that. A person can change his name. You merely call—you merely identify the new name of the previous body, that is all.

The Court: You say you meant 16th Street?

The Witness: I—at all times, when I used the word [fol. 387] "ASTAPA", "Government Procurement", anything, I am referring to one person known by other names, and that is the Procurement Office down at 16th Street, the Quartermaster Clothing Procurement. I really don't know which is the absolute proper name, but it has been referred—it has been referred to in many names, and at all times I meant the one organization.

By Mr. Spar:

Q. And that was the—

A. Procurement Division at 16th Street.

Q. And thus, all you know is that you used these names interchangeably and at will?

A. I used those terms to always indicate the Quartermaster Corps, with whom these contracts were let.

Q. Now, sir, on direct examination you referred to a deviation from a contract, and you referred to a shading; s-h-a-d-i-n-g?

A. Yes.

Q. Is that what you referred to?

A. Yes.

Q. May I call to your mind, sir, that isn't it a fact that Bonita Originals wrote a letter to the Government agency, [fol. 388] informing the Government that a certain machine had broken down that was used for shading and asked permission to use hand work for shading? Was that the deviation you are referring to?

A. I don't remember the exact circumstances, how the thing was negotiated. I only remember the desire to change from a prescribed method of marking to the absence of marking.

Q. You mean no marking at all?

A. That was the way—that was what we had hoped to accomplish.

Q. Well, isn't it a fact that all the Government reported back to Bonita Originals was that it was immaterial whether they used the machine or hand work for shading, but as long as it was shaded?

A. I do not know of such exchange of letters.
Q. Do you know whether they exist or not?
A. I do not know whether such letters exist.
Q. Do you know that they don't exist?
A. I do not know that they don't exist.
Q. You don't know anything about the question of shading then; is that right?
A. It is not right.
Q. The ultimate decision by the Government?
[fol. 389] A. That is not right, when you say I know nothing about it.
Q. Well, what was the ultimate decision, to your memory?
A. To my memory?
Q. Yes, sir.
A. To my memory, we were able to do these things without shading, as originally specified in the specifications.
Q. There was no hand work done at all?
A. I do not know to what extent they circumvented the original contract.

Mr. Spar: I ask that that be stricken from the record, if your Honor please, that expression.
The Court: The word what?
Mr. Spar: "Circumvent."
Mr. Christy: It was responsive to the question, your Honor.
The Court: Well, you don't know in which way—we prefer the word "deviate"—they deviated?
The Witness: I don't know how the ultimate deviation was accomplished.

Q. And you don't know whether or not permission was ever granted for it?
[fol. 390] A. It was my understanding that permission was granted for the deviation.
Q. And you don't know who gave the permission?
A. No, I don't.
Q. You don't know how high in the echelon of things in the Quartermaster Corps the deviation went before it was granted?

Mr. Christy: I object to that question, your Honor.
The Court: I will sustain it.

Mr. Spar: No further questions.

The Court: I want to dispose of this witness before lunch, if we can.

Mr. Carroll: No questions.

The Court: That is very helpful.

Mr. Christy: I have some very short ones.

Redirect examination.

By Mr. Christy:

Q. Mr. Carlin, I call your attention to Defendant's Exhibit A, to the notation that check 2213, the word "exchange" appears thereon, does it not?

A. It appears.

Q. Do you notice anything unusual about that word "exchange"?

Mr. Spar: I object to that, if your Honor please. I [fol. 391] don't know what that means, "unusual" with the word.

Mr. Sullivan: It speaks for itself, if the Court please.

The Court: Overruled.

A. The legend "exchange" has been—there has been an attempt to erase it. It is smudged.

Mr. Christy: Thank you.

Q. Now, Mr. Carlin, Mr. Spar asked you whether you had answered certain questions before the Senate Committee.

The Court: May I see that exhibit, please?

Proceed.

Mr. Christy: I am reading at the bottom of page 23.

Q. Do you remember this question, Mr. Carlin:

"Mr. Kennedy: Did he mention now during this period of time the people that he knew particularly well at ASTAPA?"

And do you remember giving this answer:

"Mr. Carlin: There were two names that I recall that were mentioned many times, and so I have them fixed in mind."

[fol. 392] Mr. Spar: I object to that. It has already been asked and answered.

The Court: He was asked that question on cross-examination.

Mr. Christy: I want to continue, your Honor.

Q. Do you remember that question and that answer?

A. Yes.

Q. And do you remember this question and this answer, Mr. Carlin:

"Mr. Kennedy: Would you give us those names.

"Mr. Carlin: There was a Major Farnell, I believe, the name Farnell, I think it was Major, and a woman, a Mrs. Hort."

A. Yes.

Q. Do you remember that question and that answer?

A. I do.

Mr. Christy: No further questions, your Honor.

Mr. Sullivan: If the Court pleases, I would like to ask that the Government produce the check stub for the second $1,000-check, which I haven't seen.

The Court: Why didn't you ask him privately for it? [fol. 393] What is the problem?

Mr. Christy: If we have it, your Honor, we are perfectly willing to give it to him.

The Court: They have given you everything at my direction, and I am sure they will give it to you.

Mr. Sullivan: If your Honor pleases, last Friday I did ask the Government to—

The Court: Please, please. I don't want this in front of the jury. They have made all the books available that I have instructed them to make available. They have made every single record that I have instructed them to make available to you, and I will instruct them that if this is available, to make this available. We need not have any more discussion. This will be made available to you, if they have it.

Is there any further cross of this witness?

Mr. Spar: No, sir.

The Court: Thank you, Mr. Carlin.

(Witness excused.)

The Court: Ladies and gentlemen, we will recess until 2.15 for lunch.

(Recess to 2.15 p.m.)

[fol. 394] Afternoon Session—2.15 p.m.

(The following took place in the absence of the jury:)

Mr. Sullivan: If the Court please, may I address you?

If your Honor please, according to the case of Gordon v. United States, 344 U.S. 414, it was my understanding having to do with the prior statement that I asked to be furnished to me, that was given to Balaban and Poole, it was my understanding that if I can tell your Honor of a specific statement, that then the rule is that you see the statement and observe if there is any inconsistency, and if there is, you give it to me; am I mistaken in that?

The Court: That is substantially correct.

Mr. Sullivan: Well, I did ask for the specific statement given to Balaban and Poole.

The Court: I know, but you didn't point out that there was any inconsistency. That is the obligation.

Mr. Sullivan: I don't have to, as I understand it.

[fol. 395] The Court: Oh, yes, you do. You must at least indicate to me something that makes it appear that there might have been something inconsistent in that statement. Then I would read it over. But there wasn't the slightest indication. As matter of fact, everything you brought out indicated that it was consistent. The mere request doesn't make it necessary for me to look at it. Otherwise the Court would be busy all day long looking at every possible document that had anticipated the case. You may show something inconsistent, because that is the only purpose upon which you could use it, or at least something that tends to make us believe that there was something inconsistent, and then the Court has an obligation to look at it.

I am familiar with the entire line of cases.

(Jury in box.)

Mr. Christy: The Government calls Leon Levy.

* * * * * * *

[fo. 396]

EXHIBIT "A"

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRY LEV, et al.,

Appellants.

Affidavit

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, ss.:

ARTHUR H. CHRISTY, being duly sworn, deposes and says:

1. He is Chief Assistant United States Attorney for the Southern District of New York and, as such, is fully familiar with all the proceedings heretofore had in the above-captioned matter.

2. He was the prosecutor at the trial of *United States* v. *Lev, et al.*, in March and April, 1957.

3. During the course of the trial, a demand was made for a statement allegedly signed by Government witness Melvin Carlin and given to investigators of the Senate Permanent Subcommittee on Investigations, Jack S. Balaban and L. L. Poole. At the time such demand was made, your deponent did not have in his possession any signed statement by the Government witness Carlin, nor any report of an interview of Carlin by Senate investigators; nor was your deponent aware that there was in existence either a signed statement or a report of an interview.

4. Following the decision in *Jencks* v. *United States*, 353 U.S. 657, decided in June 1957, your deponent communicated with the Senate Permanent Subcommittee on Investigations to determine if the Subcommittee had in its

[fol. 397] possession a statement signed by Carlin or a report of an interview with Carlin.

5. Your deponent was advised that a search was made through the files of the Senate Permanent Subcommittee on Investigations and that no statement signed by Carlin was located.

6. Your deponent was advised that Senate investigators Jack S. Balaban and L. L. Poole had interviewed Carlin on one occasion and had prepared a memorandum for Chief Counsel Robert F. Kennedy which contained a report of their interview with Carlin. The Senate Permanent Subcommittee on Investigations advised your deponent by letter that no signed statement by Carlin could be found, and such letter is attached to and made a part of this affidavit.

7. The Senate Permanent Subcommittee on Investigations, at your deponent's request, forwarded a copy of the memorandum prepared by Jack S. Balaban and L. L. Poole. This memorandum, containing a report of an interview with Carlin, was prepared on March 17, 1955, by Jack S. Balaban and L. L. Poole. A copy of the memorandum furnished by the Senate Permanent Subcommittee on Investigations has been signed and dated by Jack S. Balaban and it is contained in a sealed envelope attached hereto and made a part of this affidavit. It may, of course, be opened by the Court for inspection.

8. Investigator, Jack S. Balaban, who interviewed Carlin has signed an affidavit stating that, to his knowledge, no signed statement was ever taken from Carlin and that the memorandum prepared by him following his interview with Carlin is the only one in the files of the Senate Permanent Subcommittee on Investigations relating to an interview with Carlin. Balaban's affidavit is attached hereto.

/s/ Arthur H. Christy

Sworn to before me this
4th day of April, 1958.

/s/ Jack W. Ballen
Notary Public, State of New York
No. 41-0146400, Queens County
Term Expires March 30, 1959

[fol. 398]

EXHIBIT "B"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRY LEV, et al.,

Appellants.

Affidavit

STATE OF NEW YORK,
COUNTY OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, *ss.*:

JACK S. BALABAN, being duly sworn, deposes and says:

1. He is an investigator employed by the Office of Comptroller General of the United States and assigned to the Senate Permanent Subcommittee on Investigations of the United States Senate Committee on Government Operations, He has been so employed since 1935.

2. In his position as investigator, he was assigned to work on the investigation by the Subcommittee into the fraudulent practices in textile procurement in the military services, which investigation culminated in Hearings before the Subcommittee in 1955.

3. In the course of his work on the investigation into the procurement of certain garrison cap contracts awarded to Bonita Originals, Inc. in June, 1952, he had occasion to interview Melvin Carlin, a certified public accountant at 11 West 42nd Street, New York, New York. Carlin was an accountant for Bonita Originals, Inc. With him at this interview was another investigator of the Subcommittee, L. L. Poole.

[fol. 399] 4. Your deponent and L. L. Poole interviewed Carlin, whom your deponent is advised was a Government

witness in the case of *United States* v. *Lev, et al.*, tried in the Southern District of New York in March and April, 1957, in Carlin's office in March of 1955.

5. This was the only interview your deponent recalls having with Melvin Carlin and, upon information and belief, it is the only interview investigator L. L. Poole had with Carlin.

6. At no time did your deponent obtain from Carlin a signed statement and, upon information and belief, at no time did L. L. Poole obtain a signed statement from Carlin.

7. L. L. Poole resigned as an investigator for the Senate Subcommittee in 1958 and his whereabouts are presently unknown to your deponent.

8. Following the interview with Carlin in March, 1955, your deponent prepared for Robert F. Kennedy, Chief Counsel of the Subcommittee, a memorandum of the interview with Carlin. In this memorandum your deponent summarized generally what Carlin had related to your deponent and L. L. Poole. This memorandum was not adopted nor approved by Carlin, nor is it a substantially verbatim recital of an oral statement made by Carlin.

9. This memorandum was prepared on March 17, 1955, and is the only memorandum prepared by your deponent in connection with the interview by your deponent and L. L. Poole with Carlin and is the only memorandum your deponent knows of in the files of the Subcommittee.

10. On this day, your deponent was shown a copy of the memorandum he and L. L. Poole prepared following the interview with Carlin. Your deponent has signed his name and the date on each of the three pages of this memorandum.

/s/ JACK S. BALABAN
JACK S. BALABAN

Sworn to before me this
4th day of April, 1958

/s/ JACK W. BALLEN
Notary Public, State of New York
No. 41-0146400, Queens County
Term Expires March 30, 1959

[fol. 400]

EXHIBIT "C"

(Letterhead of United States Senate, Committee on Government Operations Senate Permanent Subcommittee on Investigations.)

(Stamp)

U.S. ATTORNEY
Mr. Christy
1958 MAR 27 PM 4:22
9357
S.D.N.Y.

March 25, 1958

Mr. Arthur H. Christy
Chief of the Criminal Division
Southern District of New York
U. S. Court House
Foley Square
New York, New York

Dear Mr. Christy:

A check has been made of all references in the possession of this Subcommittee concerning Melvin Carlin and no record has been found of any interrogatory or interview other than that of Jack Balaban. I trust that this is the information you desire.

Very truly yours,

/s/ DONALD O'DONNELL
Donald F. O'Donnell
Acting Chief Counsel

[fol. 401]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 283—October Term, 1957.
(Argued April 29, 1958.)
Docket No. 24809

UNITED STATES OF AMERICA, Appellee,

—v.—

HARRY LEV, MARVIN RUBIN, MAURICE ADES and RAYMOND WOOL, Defendants-Appellants.

OPINION—August 11, 1958

Before: Clark, Chief Judge, and Hincks and Stewart, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge*.

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from their convictions of conspiracy to defraud the United States, 18 U. S. C. §371, and Rubin also appeals from his conviction of bribery, 18 U. S. C. §201. Affirmed.

[fol. 402] Arthur H. Christy, Chief Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and Fioravante G. Perrotta and Joseph T. Altier, Asst. U. S. Attys., New York City, on the brief), for appellee.

Milton S. Gould, of Gallop, Climenko & Gould, New York City (George Trosk, of Gallop, Climenko & Gould, New York City, on the brief), for defendant-appellant Harry Lev.

John T. Sullivan, New York City, for defendant-appellant Marvin Rubin.

Thomas J. Short, of Dougherty, Ryan & Mahoney, New York City, for defendant-appellant Maurice Ades.

Albert H. Treiman, New York City, for defendant-appellant Raymond Wool.

CLARK, Chief Judge:

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from a verdict and judgment of conviction for conspiracy to defraud the Government in violation of 18 U. S. C. §371. Rubin also appeals from a conviction for bribery in violation of 18 U. S. C. §201. The defendants were indicted for a single conspiracy to defraud the United States in the administration and procurement of Government contracts. Alleged errors involve principally a claimed variance between a charge of a single conspiracy and proof of two, and a failure to order a statement from a Government witness delivered to the defense for use in cross-examination. Ades and Wool also claim an insuffi- [fol. 403] ciency of the evidence, as does Rubin with respect to the bribery charge.

The proof adduced at the trial below tended to show overt acts between February 1952 and about August 1953 involving the procurement and administration of two contracts awarded to Bonita Originals, Inc., for the manufacture of Army garrison caps, and overt acts in the period commencing in April 1953 and continuing on into 1954 involving the procurement and administration of a contract awarded to Spencer Manufacturing Corporation for the manufacture of white hats for the Navy. During the former period Ades was the president and owner of 50 per cent of the stock of Bonita, Rubin was employed by Bonita on a profit-sharing basis to deal with Government officials on the garrison cap transaction, and Wool, an Army officer in the Quartermaster Corps, was assigned the Bonita contracts for administration until they were completed. Lev was not involved in either the procurement or the administration

of the Bonita contracts. But Lev, Ades, and Rubin were all interested in Spencer Manufacturing Corporation and involved in the procurement and administration of the white hat contract. Wool was appointed a Contracting Officer of the Armed Services Textile and Apparel Procurement Agency (ASTAPA) prior to the award of the white hat contract and participated in both the award and the administration of that contract. On this proof Judge Kaufman, for the defendants' benefit, charged the jury that in fact two separate conspiracies were involved—the Bonita conspiracy and the white hat conspiracy—although he expressed doubts as to whether it was improper to characterize the conspiracy as a single one.

Defendants urge that a fatal variance occurred between the indictment and the proof concerning the number of conspiracies, and that this error was compounded by confusion on this point in the court's charge to the jury. A claim of [fol. 404] variance is not unusual in a conspiracy case. *United States* v. *Rosenberg*, 2 Cir., 150 F. 2d 788, 793, certiorari denied 326 U. S. 752, and the courts have not evolved clear lines for distinguishing single and multiple conspiracy situations. Cf. *Blumenthal* v. *United States*, 332 U. S. 539; *Berger* v. *United States*, 295 U. S. 78; *Kotteakos* v. *United States*, 328 U. S. 750; *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, certiorari denied *Cohen* v. *United States*, 323 U. S. 799; *Monroe* v. *United States*, D. C. Cir., 234 F. 2d 49, certiorari denied 352 U. S. 873; *Canella* v. *United States*, 9 Cir., 157 F. 2d 470. Here, although from Lev's vantage point the Bonita transaction was completely separate from the white hat transaction, from the viewpoint of the other appellants the conspiracy was a single one to defraud the Government in matters of war contracts. Thus as to Rubin, Ades, and Wool, who were involved in both transactions, there is, properly speaking, no variance. See *Canella* v. *United States, supra*, 9 Cir., 157 F. 2d 479; *cf. Blumenthal* v. *United States, supra*, 332 U. S. 539.

As Lev was involved only in the latter transaction, a more serious question of variance does arise as to him. In *Berger* v. *United States, supra*, 295 U. S. 78, 82, and *Kotteakos* v. *United States, supra*, 328 U. S. 750, 757, the Supreme Court set out the applicable rule in these circum-

stances: "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'effect the substantial rights' of the accused." In this Circuit the test applied has been stated as whether the conspiracies ultimately proved might have been joined in a single indictment and whether the trial was conducted so as to protect the rights of defendants who are not common to all conspiracies. *United States* v. *Cohen, supra,* 2 Cir., 145 F. 2d 82, 89. Although Lev claims that the confusion inherent in the indictment was compounded by the court's instructions, a thorough reading of the charge shows [fol. 405] that Judge Kaufman was scrupulous in protecting Lev's rights. In fact it is apparent that the jury was able to differentiate between the evidence relevant to defendants involved in only one of the conspiracies, for it acquitted defendant Pollock, who was alleged to be involved solely in the Bonita affair. It follows that the variance here was not prejudicial and was at most harmless error.

Ades and Wool claim that the evidence linking them to the conspiracy was insufficient to justify admitting in evidence against them the admissions of other conspirators. Two witnesses for the prosecution gave important evidence involving particularly statements by Rubin defining and particularizing the use of funds to pay for entertainment of and gifts to the Government inspectors. These were Carlin, accountant for Bonita, and Levy, secretary-treasurer and co-owner of Bonita. Levy's testimony particularly went into details of funds drawn by him for uses which Rubin's directions and explanations to him showed were improper, definitely bringing the others, notably Ades and Wool, into the conspiracy. Hence we must consider the independent evidence supporting the inference of participation in the conspiracy and justifying the receipt of this testimony against them.

The independent evidence linking Ades to the illegal plot shows that he was present at a meeting with Rubin in the spring of 1952 where Rubin allegedly stated that he would need 5 to 7 per cent of the contract price in order to entertain Government personnel. Ades then went to Puerto Rico, where he managed the factory which manufactured the caps and hats supplied the Government. There is testi-

mony that, while running the plant in Puerto Rico, he induced a Government inspector, Ienni, to live at his apartment rent free; that he brought another Government employee named Schlesinger to Puerto Rico secretly under an alias; that he attempted to bribe another inspector, Wat- [fol. 406] kins; that he wrote a letter attempting to have Forcillo, a Government inspector, removed because he was too tough; and that, even before the white hat contract was awarded, he was bragging that they would receive it.

As to Captain Wool, the proof was that he went to visit Rubin's office several times; that as the officer supervising the procurement he granted valuable contractual deviations whenever they were requested, both in the Bonita contract and later to Lev; that he had several meetings with Lev before the opening of the bid on the white hat contract; and that as contracting officer he approved Lev's bid, although the pre-award survey showed that Lev had no machinery at all in Puerto Rico to manufacture the hats. There was testimony that in May or June 1953 Wool came to the Bonita office and took a topcoat and again, some children's dresses. There was further evidence from Rubin's doctor, Dr. Franklin, who testified that Rubin introduced Wool to him and that he treated Wool on nine separate office visits and rendered a bill for $265, which was paid by a check from the Bonita Corporation for $285 (thus including $20 for Rubin himself). Later when Rubin came to testify he said that Wool's affliction was deep-seated and of long standing, which no Army doctor had been able to reach, but which Dr. Franklin proceeded to cure by this course of treatment. This evidence stands uncontradicted on the record, and Wool (who did not testify) offered no satisfactory explanation of Bonita's making this payment for him. There was also considerable circumstantial evidence tending to show, when coupled with testimony as to statements made by an alleged coconspirator, that a month after the white hat contract was awarded Lev advanced him $5,000, which he used to complete payments on the purchase of a house. Later in testifying to a Senate committee investigating these frauds he claimed to have borrowed money and given a note to one Luciano, who denied this in testifying below. This [fol. 407] testimony was presented by the Government to

show consciousness of guilt. Thus the evidence offered as to both Ades and Wool presents amply sufficient groundwork for the admission of testimony of statements by coconspirators and in particular for Levy's terribly devastating testimony, which, when believed by the jury, left no question of guilt.

Defendants Lev and Rubin assert that the trial court committed reversible error in refusing to order the Government to produce for their inspection a statement made by Government witness Carlin to agents of a Senate investigating committee. Since the decision in *Jencks* v. *United States*, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony. But before a new trial is to be ordered, we must see if the statement is in any event discoverable. Although the statement is not a part of the lower court record, the prosecutor—who did not have it at the trial—has procured from the Senate committee and presented to us in a sealed envelope a verified copy of a Senate investigator's summary of an interview with Carlin. An additional affidavit establishes that this summary is the only written record made of Carlin's interview, and that it was written following the interview and is not a substantially verbatim record of Carlin's statement. We have examined the summary, and internal evidence from it tends also to bear this out.

While defendants may perhaps have been given a right to inspect a statement of this nature by the *Jencks* decision, *supra*, 353 U. S. 657, 668,[1] the recent codification of dis- [fol. 408] covery in this situation allows a defendant to examine only the following:

---

[1] Here the Court said: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial." While not specified, it seems inferable that the F. B. I. recording of the reports made orally was contemporaneous with the making of the oral statements.

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U. S. C. §3500(e)(1)(2).

As this statute will apply on a new trial of any of these defendants, and as under it discovery of the summary cannot be required, the trial court's error is rendered harmless, *United States v. Miller*, 2 Cir., 248 F. 2d 163, certiorari denied *Miller* v. *United States*, 355 U. S. 905.

There remains to be discussed Rubin's contention that there was insufficient evidence for the jury to have convicted him of bribery. We think the evidence quite sufficient. There was proof that Chief Inspector Porreca, whose duty it was to assign inspectors, upon a request had removed Forcillo from Puerto Rico and replaced him with a more lenient man. Thereafter Rubin sent Porreca a deep freeze, for which Bonita paid. Porreca later received some meat to put in the freezer. He testified that he never paid for any of this, nor was he ever asked to pay for it. This was enough evidence of violation of the bribery statute, 18 U. S. C. §201. The defense efforts to show that nothing Porreca did actually defrauded the Government are irrelevant as the statute shows.

This important trial discloses a sad and sordid picture of Government agents yielding to rather cheap temptation, [fol. 409] some willingly, some only under pressure. But there is another side to the story, of inspectors who stood out at all times against such debauchery of their obligations and who were transferred to other activities for their pains. It is to be hoped that they received no permanent setbacks in their careers, but eventually were accorded that proper respect which they so richly merited.

Convictions affirmed.

[fol. 410]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

HENRY LEV, MARVIN RUBIN, MAURICE ADES and RAYMOND WOOL, Defendants-Appellants,

JOSEPH G. PORRECA, ERIC C. FARNELL, MELLA HORT, DAVID POLLACK and GEORGE A. EARNSHAW, Defendants.

JUDGMENT—August 11, 1958

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro, Clerk.

[File endorsement omitted]

[fol. 411] Clerk's Certificate (omitted in printing).

[fol. 412]

SUPREME COURT OF THE UNITED STATES

No. 435, October Term, 1958.

HARRY LEV, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 9, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 10, 1958.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme
Court of the United States.

Dated this 9th day of
September, 1958.

[fol. 413]

SUPREME COURT OF THE UNITED STATES

No. 436, October Term, 1958.

RAYMOND WOOL, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 9, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 10, 1958.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 9th day of September, 1958.

[fol. 414]

SUPREME COURT OF THE UNITED STATES

No. 437, October Term, 1958.

MARVIN RUBIN, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 9, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 10, 1958.

/s/ JOHN M. HARLAN
Associate Justice of the Supreme Court of the United States.

Dated this 9th day of September, 1958.

[fol. 415]

SUPREME COURT OF THE UNITED STATES

No. 435, October Term, 1958.

HARRY LEV, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI. December 8, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to questions 5, 6, and 7 presented by the petition for the writ which read as follows:

"5. Is it proper for a reviewing court to make an examination in camera of a sealed summary of a witness's prior statement to a government investigator furnished it by the prosecutor and of ex parte affidavits pertaining to the summary in order to determine whether the summary is discoverable under the provisions of Title 18 U. S. C., Section 3500, when no claim is made that it contained irrelevant or extraneous matter?

"6. Are not summaries and reports of prior statements made by witnesses to a government investigator available to the defendant under the provisions of Title 18 U. S. C., Section 3500?

"7. Does Title 18 U. S. C. Section 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?"

The case is consolidated with Nos. 436 and 437 and a total of three hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter and Mr. Justice Stewart took no part in the consideration or decision of this application.

[fol. 416]

SUPREME COURT OF THE UNITED STATES

No. 436, October Term, 1958.

RAYMOND WOOL, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI. December 8, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to question 2 presented by the petition for the writ which reads as follows:

"2. Whether the rights of the petitioner were substantially prejudiced when the trial court denied the motion of the defendants to direct the Government to produce a statement which a witness for the Government had previously given to government agents, in direct violation of this Court's decision in Jencks v. U. S., 353 U. S. 657."

The case is consolidated with Nos. 435 and 437 and a total of three hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter and Mr. Justice Stewart took no part in the consideration or decision of this application.

[fol. 417]

SUPREME COURT OF THE UNITED STATES

No. 437, October Term, 1958.

MARVIN RUBIN, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI. December 8, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with Nos. 435 and 436 and a total of three hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter and Mr. Justice Stewart took no part in the consideration or decision of this application.

FILE COPY

Supreme Court, U.S.
FILED
OCT 10 1958
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 435

HARRY LEV,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

ANTHONY BRADLEY EBEN,
135 South LaSalle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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103 Cong., Rec. 14720 (August 27, 1957) .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. .....

HARRY LEV,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justices, and the Associate Justices of the Supreme Court of the United States:

Your petitioner Harry Lev respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on August 11, 1958. See Appendix, *infra*, p. 45. The Court of Appeals affirmed the judgment of the United States District Court for the Southern District of New York finding the petitioner guilty of a charge of conspiracy to violate Title 18, U. S. Code, Section 371.

OPINION BELOW.

The opinion of the Court of Appeals for the Second Circuit, dated August 11, 1958, is as yet unreported and is printed in appendix hereto, *infra*, p. 31.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on August 11, 1958. No petition for rehearing was filed. The time for filing a petition for certiorari was extended to October 10, 1958, by order of this Court entered September 9, 1958. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. In determining the prejudicial effect of a variance between a charge of one conspiracy and proof of two separate and distinct conspiracies, should not the reviewing court examine the entire record in order to ascertain whether substantial rights have been affected?

2. Is the harmful effect of error resulting from a variance between a charge of one conspiracy and proof of two to be determined simply by considering whether the two conspiracies could have been joined in one indictment and by examination of the court's charge?

3. Can the error resulting from the variance of a charge between one conspiracy and proof of two be harmless in a long and complicated trial simply because the jury was admonished not to consider the evidence proving one of the conspiracies as to a defendant not participating in it? Are not such cautionary instructions ineffective to protect such a defendant?

4. Is the error arising from the charge of one conspiracy and proof of two cured by equivocal and ambigu-

ous instructions permitting a defendant to be bound by the acts and declarations of others participating in a conspiracy to which he was not a party?

5. Is it proper for a reviewing court to make an examination *in camera* of a sealed summary of a witness's prior statement to a government investigator furnished it by the prosecutor and of *ex parte* affidavits pertaining to the summary in order to determine whether the summary is discoverable under the provisions of Title 18 U. S. C., Section 3500, when no claim is made that it contained irrelevant or extraneous matter?

6. Are not summaries and reports of prior statements made by witnesses to a government investigator available to the defendant under the provisions of Title 18 U. S. C., Section 3500?

7. Does Title 18 U. S. C. Section 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?

STATUTES INVOLVED.

Title 18 U. S. C., Section 371:

> If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18 U. S. C., Section 3500:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than

the defendant) to an agent of the Government shall be subject of subpena, discovery or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its dis-

cretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement" as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Rules of Criminal Procedure:

Rule 52. Harmless Error and Plain Error.

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT.

The court below held that there was multiple but harmless error arising out of petitioner's conviction by a jury sitting in the Southern District of New York. The conviction was upon an indictment charging him together with eight other defendants with conspiracy to defraud the United States of its governmental functions of administration and procurement of governmental contracts free from partiality, obstruction, dishonesty and fraud and its right and interest in the conscientious and faithful services of certain employees of the New York Quartermaster Procurement Agency and the Armed Services Textile and Apparel Procurement Agency (hereinafter referred to respectively as NYQPA and ASTAPA) free from corruption, dishonesty, bias, hope of unlawful reward and fraud in violation of Title 18, U. S. Code, Sec. 371.

Three of the named conspirators, Major Farnell, Earnshaw and Porreca did not go to trial. The latter pleaded guilty and the other two were granted severances. Of the six defendants standing trial all but Pollack were convicted. He was acquitted.

The matters set forth in the one count charging conspiracy had all been aired before the McClellan Committee of the Senate (Permanent Subcommittee on Investigations of the Committee on Government and Operations, 84th Congress, First Session) in 1955, when it held hearings on textile procurement in the Military Services (R. 1528).

Petitioner, aware of the evidence there produced, consistently prior to and during the trial maintained that the government would attempt to prove at least two or more separate and distinct conspiracies under its one conspiracy

charge and that petitioner could at best be connected with but one.[1]

Petitioner's worst fears were realized when the government offered evidence as to conspiracies relative to the procuring and administration of (a) a 1952 contract to manufacture garrison hats for the Army (hereinafter referred to as the Bonita conspiracy) and (b) a 1953 contract to manufacture sailor hats for the Navy (hereinafter referred to as the White Hat conspiracy). The Government in the court below and the Court of Appeals concede petitioner had no connection whatsoever with the Bonita conspiracy. Petitioner's co-defendants, Rubin, Ades, Wool, Hort, Porreca were involved in both conspiracies.

In attempting to prove the Bonita conspiracy, the government proved thirty-three separate transactions with all of their ramifications, none of them admissible against petitioner. These transactions were five separate payments of money or delivery of property to defendant Porreca, a supervisor at NYQPA and ASTAPA (R. 457-463, 476-8, 510, 514, 518-19, 1137, 1188); nine separate payments of money or delivery of property to defendant Hort, a procurement clerk in NYQPA and thereafter a contract administration clerk in ASTAPA (R. 439, 466, 470, 481-496, 521, 532-8, 552-4, 568, 571); three separate payments of

1. Prior to trial petitioner filed a timely motion (a) to dismiss the indictment on the ground that the Grand Jury had before it no evidence which could justify the inference of a single conspiracy (b) in the alternative, for a separate trial on the ground that it was inconceivable that the jury would be able to differentiate the evidence admissible against him and the large amount of evidence inadmissible against other defendants alone; (c) for an inspection of the Grand Jury minutes in aid of determination by the Court of both alternative motions (R. 4429-4494). The motions were denied. (d) At the conclusion of the government's opening to the jury, he moved again for a dismissal of the indictment on the grounds that the opening indicated that the government proposed to prove not one but a number of conspiracies (R. 46).

money or delivery of property to Wool, a captain in the U. S. Air Force attached as a contracting officer at NYQPA and thereafter chief of a purchasing section of ASTAPA, and one payment of money to a third party for Wool's benefit (R. 503-4, 542-6, 550-1, 1142-6); five payments of money to defendant Pollack, an accountant at NYQPA and ASTAPA (R. 421-434, 486-496, 530, 533-8, 552-4); four payments of money to Farnell, a Major in the Army attached to NYQPA as a contracting officer (R. 422-3, 533, 487, 498, 496, 500, 533-8); one delivery of property to Earnshaw, a purchasing agent in NYQPA (R. 506) and, in addition, although they were not named as defendants, one payment of money to Ienni, a government inspector (R. 1337), one payment of money to one Schlesinger (R. 633-6), one offer to bribe one Watkins and two payments of money to a number of persons identified only as "people at Sixteenth Street" the headquarters of NYQPA and ASTAPA (R. 476-8, 525-6).

In support of the White Hat conspiracy, the government gave evidence which related to only six transactions, *i.e.*, one alleged payment to Wool (R. 610-612), the payment of money on one occasion (R. 617-620) and the purchase of clothing on another (R. 620) (R. 1599) for Hort, the payment of money on one occasion (R. 1249-1250) and the purchase of a ticket to dinner on another (R. 623-5) to Porreca, and the advance (repaid) of a trifling hotel bill for one Vinning (R. 1798-1800, 3062-3064).

Throughout the trial lasting approximately thirty-six days, petitioner repeatedly urged upon the trial court the dangers to him of such a mass trial and the inherent prejudice to him arising from the admission in evidence against the other defendants of acts and declarations bearing solely upon the Bonita conspiracy (R. 46, 103-116, 301, 402, 453-4, 461, 498, 500, 502, 515, 1077, 1157, 1190, 1212).

During the course of the trial the trial court first indicated that the case would go to the jury with an instruction that they must find *one* conspiracy (R. 46). At the conclusion of the Government's case he stated that although he thought there was enough to go to the jury on the *one* conspiracy theory, he would submit it to the jury with an instruction that petitioner had not entered the Bonita conspiracy (R. 1537, 1538, 1840, 1843-1846, 1886). In the interim, from time to time, the trial court instructed the jury that the government had the burden of establishing that there was *one* conspiracy; and if the petitioner was a member of that conspiracy, he would be chargeable as to the acts and declarations of the co-conspirators prior to the time he joined it (R. 103, 115, 402). He also told the jury during the trial that a conspiracy was a partnership in crime and the acts and declarations of one conspirator was binding on all others found to be co-conspirators (R. 100, 101, 483, 484, 540).

The Court of Appeals for the Second Circuit upon petitioner's appeal held that this variance between the charge in the indictment and proof was error but harmless on the theory that substantial rights of the petitioner were not affected.

In determining this question it stated that the test to be applied in the Second Circuit was whether the conspiracies ultimately proven could have been joined in a single indictment and whether the trial was conducted so as to protect the rights of defendants not common to all conspiracies.

During the course of the trial an important government witness, Carlin, testified to conversations among defendants Rubin and Ades and one Levy, during the course of which Rubin stated that he could obtain government contracts for Ades and Levy because of his connections with

NYQPA and that about 5% of the contract price would be needed as expenses to return favors that might be extended to him there. He also testified that Rubin had stated that these connections would see that he got contracts, that he could exercise some control over the selection of inspectors who would be assigned to examine the goods after manufacture and that he could get deviations from contract requirements, if needed (R. 306-316, 327-330).

During cross-examination and at its termination, the trial court was asked to direct the government to produce a statement which this witness stated he believed he had signed, and which he said he had given to Balaban and Poole, government investigators, concerning the events to which he had testified. The trial court denied these requests on the grounds that no proper foundation showing inconsistency had been laid (R. 342-3, 394-5).

Upon the appeal of this cause to the Court of Appeals (*Jencks* v. *United States* (1957), 353 U. S. 657, having been handed down by this Court in the meantime) the government transmitted to the court below a sealed envelope, the contents of which were never made available for the inspection and examination of petitioner and, of course, had never been produced at the trial for examination of the trial court, and is therefore not a part of the record here.

The prosecutor also furnished the court below with his affidavit; the affidavit of Balaban to the effect that he, together with Poole, had interviewed Carlin, that this was the only interview he "recalls" and that "upon information and belief" it was the only interview Poole had with the witness; and an unsworn letter from the acting counsel of the Senate Committee. No affidavit from Poole was submitted. The affidavits and letters are printed in the appendix hereto, *infra*, pp. 39-44.

Upon his appeal, petitioner, under the authority of the *Jencks* decision, urged that the trial court erred in refusing to direct the government to produce for him this statement. The Court of Appeals held this to be error also but harmless. It reached this conclusion by making an *in camera* examination of the contents of the sealed envelope and one of the affidavits, stating that the document therein contained was a summary of an interview with Carlin and therefore it could not be made available to petitioner on a new trial under the provisions of Title 18 U. S. C., Section 3500.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT BELOW OPENS THE WAY TO MASS TRIALS OF SEPARATE CONSPIRACIES UNDER ONE COUNT INDICTMENTS. IT PERMITS THE IMPROPER TRANSFERENCE OF GUILT, WIDENS THE CONSPIRACY DRAGNET AND IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The first error as to petitioner found by the court below arose out of the occurrence of a variance between the single conspiracy charged and the proof of separate and distinct conspiracies, *i. e.*, the Bonita and White Hat conspiracies. *In dealing with this error the court below first admitted that "the courts have not evolved clear lines for distinguishing simple and multiple conspiracy situations."* As demonstrating this, the court below referred to three decisions of this Court, *Blumenthal* v. *United States* (1947), 332 U. S. 539; *Berger* v. *United States* (1935), 295 U. S. 78; and *Kotteakos* v. *United States* (1946), 328 U. S. 750.

It did not, however, apply these cases; but, under what it claimed was the test laid down in this type of situation in *United States* v. *Cohen* (1944) (2nd Cir.), 145 F. 2d 82, it concluded that the Bonita and White Hat conspiracies might have been joined in a single indictment, that the trial court's instructions were adequate to protect the rights of petitioner and that therefore his substantial rights had not been affected.

The decision of the court below indicates that it has disregarded the caveat of *Grunewald* v. *United States* (1957), 353 U. S. 391, that this Court will view with disfavor attempts to broaden the already pervasive and wide sweep-

ing nets of conspiracy prosecutions. Further, it is in conflict with decisions of this Court, as is hereinafter pointed out, and its action raises an important question in the administration of criminal justice in the federal courts.

A. In Failing to Examine the Entire Record to Determine Whether Petitioner's Substantial Rights Were Affected By the Variance Between the Charge and the Proof, the Court Below Is In Conflict With Decisions of This Court.

In the court below petitioner had contended that the testimony as to him had been confused with a vast amount of testimony relating to the Bonita conspiracy and that the trial court's instruction instead of effectively insulating him from the Bonita conspiracy only compounded that confusion.

Apparently, the court below did not consider petitioner's contentions for it is obvious from its opinion that no effort was made to determine whether the Bonita evidence as heretofore detailed (pp. 7-8, *supra*) prejudiced petitioner even though not admitted against him, as was done in *Kotteakos* v. *United States* (1946), 328 U. S. 750, and *Berger* v. *United States* (1935), 296 U. S. 78, hereinafter discussed. Ignoring these decisions of this Court the court below concluded that there was no confusion of the Bonita and White Hat evidence and hence no prejudice to petitioner solely and simply because the defendant Pollack, involved only in the former, was acquitted, thus demonstrating the jury's ability to differentiate the evidence relevant to each.[1]

This is surely the *non sequitur* of the year since Pollack defended on the grounds of mistaken identity, as explained

1. This same argument, when made by the government in *Kotteakos*, was rejected by this Court. *Kotteakos* v. *United States* (1946), 328 U. S. 750, 767.

by the trial court to the jury (R. 4083, 4084). Thus, the jury, as to him, was not required to distinguish between the two conspiracies.

The refusal of the court below to examine into the impact on the jury of the tremendous mass of evidence relating to the Bonita conspiracy and its consequent effect on petitioner's rights places it squarely in conflict with the rule of *Berger* and *Kotteakos* and with the result in the latter.

In *Berger* v. *United States* (1935), 296 U. S. 78, a careful scrutiny was made of the record to ascertain the possibility of prejudice to the accused because of the variance there involved. In this connection this Court stated, p. 83:

> "The proof here in respect to the conspiracy with which Berger was not connected, may, as to him, be regarded as incompetent; *but we are unable to find anything in the facts—which are fairly stated by the court below—or in the record* from which it reasonably can be said that the proof operated to prejudice his case. * * *" (Emphasis supplied.)

When the *Berger* case was before the Second Circuit (73 F. 2d 280, reversed here on other grounds) Judge Learned Hand, in discussing the materiality of the variance, asked, "Will it allow the production of evidence not competent or material to the crime he has committed, although admissible against another defendant tried at the same time?" Judge Hand did then examine into and discuss whether such incompetent evidence in that case prejudiced the accused, in which event the variance would be material.

In *Kotteakos* v. *United States* (1946), 328 U. S. 750, this Court found that under the circumstances there present the variance between the charge and proof was material. It distinguished the opposite result in *Berger* on the grounds that it was one thing to hold harmless the admission of the comparatively simple incompetent evidence in *Berger* and an entirely different thing to so hold where

many conspiracies were charged involving many defendants.

This Court stated the difference between the two cases in the following fashion, pp. 766, 777:

> "Obviously the burden of defense to a defendant connected with one or a few of *so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate.*" (Emphasis supplied.)

Again this Court stated the rule to be applied in weighing whether or not a variance has permitted a transference of guilt. It said (p. 762):

> "In the final analysis judgment in each case must be influenced by conviction resulting *from examination of the proceedings in their entirety*, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations." (Emphasis supplied.)

This Court also announced the effect to be accorded the results of such an examination of the record. It stated at pp. 764-765:

> "• • • if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error, it is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.*" (Emphasis supplied.)

Certainly these cases require of the reviewing court in multiple conspiracy trials more than a brief over-the-

shoulder glance at the acquittal of one of six defendants in determining whether substantial rights have been affected.

This is particularly so in a trial that according to the trial court (R. 483, 4022, 4039) was "long and complex" (36 days) and covered 3700 typewritten pages of testimony; and in which were introduced hundreds of exhibits, some voluminous, and in which there was necessarily created, because of the multitudinous acts involved in the Bonita conspiracy, an aura of wholesale bribery and corruption which had no proper relation to petitioner. Under these circumstances, so like those in *Kotteakos*, it is unbelievable that the results in that case and this could be different if the *court below had examined into the question at all and had* not contented itself with deciding under *United States* v. *Cohen* (1944) (2nd Cir.), 145 F. 2d 82, that the conspiracies could be joined and that the instructions were proper.

B. The Decision Below Is In Conflict With Decisions of This Court That a Variance Between a Charge of One Conspiracy and Proof of Two Conspiracies Is Not Immaterial and Non-Prejudicial Merely Because the Two Conspiracies Could Have Been Properly Joined.

In *Kotteakos* this Court was critical of the predilection of the Second Circuit to determine the immateriality of variances solely on the grounds that the two conspiracies proved could properly have been joined in two separate counts.

Speaking directly of the *Cohen* case as well as to two other cases arising out of the 2nd Circuit, *United States* v. *Liss* (1943) (2nd Cir.), 137 F. 2d 995, *United States* v. *Rosenberg* (1945) (2nd Cir.), 150 F. 2d 788, this Court stated, pp. 774-775:

> "In so ruling we are not unmindful, as the Court of Appeals has held more than once that the problem is

not merely one of variance between indictment and proof or of the right application of the policy of § 269 for freedom of judgment, but is also essentially one of proper joinder under 18 USC § 557. When we look at that section's requirement for separate statement in different counts of related but distinct 'acts or transactions of the same class of crimes or offenses, which may be properly joined instead of having several indictments,' our conclusion is reinforced.

"Section 557 too is a relaxation of rules of strict regularity. When to this is added the further relaxation of § 269 for criminal causes, all technical advantage for the accused deriving not only from detailed specification of the offense in the indictment but also from separate statement of distinct offenses would seem to be lost. But this too may be carried too far. For, potentially at any rate, § 269 *carries the threat* of overriding the requirement of § 557 for substituting separate counts in the place of separate indictments, unless the application of § 269 is made with restraint. The two sections must be construed and applied so as to bring them into substantial harmony, not into square conflict."

C. The Decision Below Conflicts With Holdings of This Court in Which It Has Indicated That in All But Simple Cases the Accused Is Not Protected From the Impact of Evidence Admitted Against Others Even Though Such Evidence Is Properly Limited by Instructions.

This Court has also been critical of the second ground relied upon by the court below—that the trial court's cautionary instructions were proper. In two recent decisions it has pointed out the evil effects and prejudice to a defendant arising out of the admission of evidence limited to a co-defendant in a *one*-conspiracy case even where correct admonitions are given the jury. Mr. Justice Jack-

son expressed it in his oft repeated statement in *Krulewitch* v. *United States* (1949), 336 U. S. 440, p. 454:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal* v. *United States*, 332 U. S. 539, 559, all practicing lawyers know to be unmitigated fiction."

This Court lately in *Paoli* v. *United States* (1957), 352 U. S. 232, affirmed the judgment of conviction in a one-conspiracy case, five to four (Justices Frankfurter, Black, Douglas and Brennan dissenting). The question involved was the admission of a confession made after the termination of the conspiracy and limited to the declarant by the instructions of the trial court.

In deciding this matter, this Court stated, p. 238:

> "These declarations (*i. e.*, those admissible only as to the declarant) must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. Even then, in most instances of a conspiracy trial of several persons together, the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what specific purposes."

The majority reasoned, however, that the cautionary instructions of the trial court were sufficient under the circumstances of the case and that the jury followed them since the one conspiracy was simple in character, the confession corroborated what the government had already established, no separate trial had ever been requested on behalf of any defendant, the confession was not introduced until the rest of the government's case was in, thus making it easier for the jury to consider the confession separately from the other testimony, and there was no mass trial and there was no multiplicity of evidentiary restrictions.

The circumstances of the trial of the case at bar were so exactly the opposite of those above-described by this Court in *Paoli* as to here compel the statement that the court below is in conflict with that decision also. They also make pertinent the observations of the minority to the following effect, pp. 247-248:

> "The dilemma is usually resolved by admitting such evidence against the declarant but cautioning the jury against its use in determining the guilt of the others. *The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors.*
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> * * * * *
>
> "The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.
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> * * * * *
>
> "It is no answer to suggest that here the petitioner-defendant's guilt is amply demonstrated by the uninfected testimony against him. That is the best reason for trying him freed from the inevitable unfairness of being affected by testimony not admissible against him. *In any event, it is not for an appellate tribunal, to know how the jury's mind would have operated if powerfully improper evidence had not in effect been put in the scale against* petitioner." (Emphasis supplied.)

D. The Approval of the Court Below of Equivocal and Ambiguous Instructions Permitting the Jury to Improperly Consider Evidence Is In Direct Conflict With Decisions of This Court.

In the case at bar the instructions of the trial court were far from clear and were so confused and ambiguous as to bring the court below in conflict with this Court in *Bollenbach* v. *United States* (1946), 326 U. S. 607, 612, 613 and again with *Kotteakos* v. *United States* (1946), 328 U. S. 750, 776. In *Bollenbach* it was held that a conviction ought not to rest on an equivocal direction to a jury on a basic issue. *Kotteakos* is authority for the rule that when a large number of defendants are to be tried extraordinary precaution is required not only that the instructions shall not mislead but that they shall scrupulously safeguard each defendant individually.

We point out that a large portion of the confusion necessarily arose from the fact that the trial court persisted in almost continuously instructing the jury on different theories. He instructed (1) from time to time as the government was putting in its case, (2) at the termination of the evidence for both sides and (3) after the jury had commenced its deliberations.

During the course of the trial the court vacillated between whether he would submit the case to the jury on a one- or two-conspiracy theory (R. 46, 100, 101, 114, 115, 402, 483, 539, 1536-1538, 1840, 1843-1846). He also told the jury that since a conspiracy is a partnership in crime the acts and declarations of one conspirator in furtherance of it are binding on all other conspirators (R. 101, 540) and further that if petitioner joined the conspiracy after it once commenced he was chargeable with the prior acts and declarations of the other conspirators (R. 103, 115, 402).

At the conclusion of the case the trial court instructed the jury that there were two conspiracies involved, that petitioner was not involved in the Bonita conspiracy (R. 4042, 4085) and that therefore none of the Bonita testimony and exhibits should be considered by the jury against him (R. 4042, 4053-54).

He also instructed that but one overt act (that petitioner, Rubin and Ades had held a meeting in Puerto Rico) applied to the White Hat conspiracy (R. 4094).

However, these instructions were buried and submerged in a 96-page charge, in the course of which the trial court repeatedly gave instructions from which the jury could reasonably conclude that they were free to find that petitioner was a party to a single conspiracy in which all defendants participated as charged in the indictment and that, if they so found, petitioner would be bound by the acts and declarations of every other defendant.

The confusion inherent in these instructions and the jury's failure to understand them is demonstrated by the fact that after the jury had deliberated for approximately 12 hours they returned to the court room and asked the court,

> "If a conspiracy existed on the Bonita contract and was not terminated by some act of the conspirators, does it then follow that:
>
> "(a) The conspiracy continued during the course of the White Hat contract.
>
> "(b) There had to be a conspiracy on the White Hat contract" (R. 4167)

This question indicated the inability of the jury to distinguish between the two conspiracies and their feeling that the Bonita conspiracy encompassed the White Hat contract and that therefore they would not need to find a separate White Hat conspiracy.

In reply the court instructed that if they found certain

defendants were engaged in the Bonita conspiracy they could then find that as to certain of these there was a continuing conspiracy into the White Hat transactions (R. 4168). He also again stated petitioner was not a member of the Bonita conspiracy and he could not be convicted unless the jury found him to be a member of the White Hat conspiracy (R. 4168, 4169). But he then immediately repeated his prior instruction to the effect that a conspiracy continues as long as there is an intention to continue it and that each conspirator who is the agent of the other during the life of the conspiracy remains an agent during all of its existence (R. 4169).

This last instruction completely destroyed any efforts the trial court might have made to protect petitioner from the Bonita evidence, and since it was a last minute instruction he should have given it special care since the last word is often decisive. *Bollenbach* v. *United States* (1946), 326 U. S. 607, 612. The trial court attempted to insulate petitioner from Bonita. Yet it told the jury that Bonita continued into the White Hat and therefore could be regarded as one conspiracy. The jury could then improperly conclude that all the acts and declarations of those in the continuing conspiracy in all its phases were admissible against petitioner as his agents. Significantly, within approximately one hour after this instruction, the jury convicted petitioner (R. 4177).

II.

THE COURT BELOW IS IN CONFLICT WITH A DECISION OF THIS COURT IN HOLDING HARMLESS THE ERROR OF THE TRIAL COURT DENYING PETITIONER'S RIGHT TO EXAMINE A SUMMARY OR REPORT OF A PRIOR STATEMENT MADE BY A WITNESS TO A GOVERNMENT INVESTIGATOR. FURTHER, IN GOING OUTSIDE OF THE CERTIFIED RECORD ON APPEAL TO MAKE AN EXAMINATION IN CAMERA OF A DOCUMENT PURPORTING TO BE SUCH STATEMENT OR REPORT AND OF EX PARTE AFFIDAVITS RELATING TO IT, THE LOWER COURT HAS FOLLOWED UNAUTHORIZED AND UNPRECEDENTED PROCEDURE RAISING IMPORTANT QUESTIONS IN THE ADMINISTRATION OF CRIMINAL LAWS IN FEDERAL COURTS.

The second error which was found by the court below arose out of the refusal of the trial court to order the government to produce a statement given by government witness Carlin relating to the events concerning which he had testified and which he believed he signed (R. 342). It stated in its opinion that because of this Court's decision in *Jencks* v. *United States* (1957), 353 U. S. 657 "the trial court judge was in error in refusing the order [to produce] on the ground that the defendants had not established inconsistencies between the statement and the witness's testimony." However, the court below then stated that before ordering a new trial it was necessary to ascertain whether the statement "is in any event discoverable." It finally reached the conclusion that under the new *Jencks* statute, Title 18 U. S. C., Section 3500, Carlin's statement it not now discoverable[1] because it was a "summary" of

1. The sole authority, *United States* v. *Miller* (1957), (2nd Cir.) 248 F. 2d 163, upon which the court below rested its decision on this point is most inapposite. In that case the court did not examine the statement, did not decide it was a summary ond did not decide that it was not discoverable under Title 18 U. S. C., Section 3500.

the witness's statement to a government agent which was prepared "following the interview and is not a substantially verbatim record of Carlin's statement." Accordingly, the court concluded that the trial court's error "was rendered harmless."

This holding is in conflict with decisions of this Court and misconstrues Title 18 U. S. C., Section 3500 in such fashion as to give rise to questions of great importance in the administration of the criminal laws in the federal courts.

A. In Considering a Document and Affidavits Pertaining to It Dehors the Certified Record, the Court Below Has Pursued a Course of Action Not Authorized by Statute or Custom. This Action Is Inimical to the Proper Administration of Justice.

In arriving at its decision, the court below utilized procedure which is virtually without precedent in courts of review. No statement or report of Carlin was made part of the authenticated and certified record on appeal. No such statement or report was ever exhibited to the trial court. Nevertheless, the court below considered *in camera* the contents of a sealed envelope furnished it by the prosecutor. Petitioner has never seen this document and his sole knowledge of it comes from the opinion of the court below. Compounding this peculiar and unorthodox procedure, the court below also considered an affidavit also furnished it by the prosecutor. Neither the alleged summary nor the affidavit are part of the record here, since the clerk of the Court of Appeals for the Second Circuit could certify only the trial record and appendices containing portions of the proceedings before the trial court and the judgment and opinion of the court below. It is therefore impossible at this point to determine the exact nature of the document in question.

The extraordinary and irregular character of this procedure is ironically highlighted by a recent decision of the court below in *United States* v. *Miller* (1957), 248 F. 2d 163. In that case the court below demonstrated unusual zeal in staying *within the confines of the certified record* when an excursion outside of it, as the court made here, might well have produced the reversal of a conviction. It refused to examine a witness's statement (also in a sealed envelope) found by the trial court, at a time prior to this Court's decision in *Jencks*, to be not only consistent with, but to contain matters unrelated to the witness's testimony. Holding that the trial court erred in failing to furnish the statement to the accused after excising portions of it, the court below stated (p. 165):

> "* * * but we cannot determine whether or not it was prejudicial error because the exhibit has by stipulation been excluded from the record on appeal. Since we cannot know that failure to deliver the statement, properly excised, was prejudicial to the defendant, we do not think a new trial should be ordered."

The procedure of the court below in the case at bar is improper not only because it ignores time-honored rules for preserving the authenticity and integrity of litigated issues, but also because it violates the very standards of fairness and justice which prompted this Court's decision in *Jencks* and the subsequent so-called *Jencks* legislation, Title 18 U. S. C., Section 3500.

Jencks, of course, establishes that the determination of whether an earlier statement or report of a government witness is suitable for cross-examination or impeachment should be made by defense counsel and not by the trial judge. Only the defense counsel has sufficient familiarity with his case to make this decision. Title 18 U. S. C., Section 3500 preserves this important right of defendants, but permits an *in camera* examination of the statement or

report by the trial court *only* when a claim is made by the government that it contains matter which does relate to the subject matter of the testimony of the witness. No such claim is made here; hence there is no statutory authority for an *in camera* examination either by the trial court or the court below. Where, as here, the claim is made, not that the statement contains extraneous matter, but that it is not discoverable at all, the question should be resolved, as are all other matters of discovery, by the trial court openly, with full right to a defendant to make all proper inquiry and argument. Cf. *United States* v. *Waldman* (D. C., N. J., 1958), 159 F. Supp. 747. Certainly the prosecutor should not be the sole judge of what he is willing to make available to a defendant.

The arrogation to itself by the court below, without statutory authority, of the right to make such a determination secretly and upon the self-serving affidavits of the prosecutor deprives petitioner and will, if approved, deprive others of the very rights accorded them by this Court in *Jencks* and spelled out in Title 18 U. S. C., Section 3500. This action of the court below raises important questions in the administration of the criminal law so as to require an exercise of this Court's supervision of the federal courts.

B. The Court Below Has Misconstrued and Misapplied Title 18 U. S. C., Section 350. That Statute Does Not Make Unavailable to a Defendant Summaries and Reports of Statements Made By Witnesses. In Fact, Such Summaries and Reports Are Made Available Under It. The Holding of the Court Below Is, Consequently, In Conflict With the Decisions of This Court.

The interpretation which the court below gives to Section 3500, without discussion, is as erroneous as its procedure. It assumes that Title 18 U. S. C., Section 3500 was intended to restrict the effect of the *Jencks* rule. Such is not the case. It is clear from the legislative history of this statutory provision that the legislation was intended merely to clarify the decision which had been the subject of considerable misunderstanding. S. Rep. No. 569, 85th Cong., 1st Sess. 2 (1957); S. Rep. No. 981, 85th Cong., 1st Sess. (1957); H. R. Rep. No. 700, 85th Cong., 1st Sess. (1957); 103 Cong. Rec. 9896 (July 8, 1957). Attempts of the Attorney General to limit the rule to require production of only authenticated or signed statements or reports of government witnesses "any rule of court or procedure to the contrary notwithstanding," were expressly rebuffed. S. Rep. No. 569, 85th Cong., 1st Sess. 10-11 (1957); 103 Cong. Rec. 14720 (August 27, 1957).

There is nothing in the language of the statute as enacted which justifies the conclusion reached by the court below that summaries of statements are immunized from the requirement to produce. Assuming, *arguendo*, that a summary such as here involved does not fit the description of the term "statement" provided by Sub-section (e) of Title 18 U. S. C., Section 3500, it does not follow, as the court below assumes, that such statement is exempt from production. It only follows that such a document is not subject to the procedure provided in that statute. If such

a summary may be produced under any other procedure established by rule or decision, the defendant is not deprived of that right by Section 3500. The text of Section 3500 as originally proposed by the Attorney General and which has been quoted in part was intended to have that effect, but was not adopted. S. Rep. 569, 85th Cong., 1st Sess. 10-11 (1957); H. R. Rep. No. 700, 85th Cong., 1st Sess. 15 (1957). Since under the *Jencks* doctrine, as the court below admits, the alleged summary of Carlin is subject to production, and this right is not expressly denied by Section 3500, it follows that the right still exists notwithstanding the enactment of the statute.

The conclusion that Section 3500 does not deprive a defendant of this right is substantiated by this Court's decision in *Scales* v. *United States* (1957), 2 L. Ed. 19, reversing *Scales* v. *United States* (1955) (4 Cir.), 227 F. 2d 581. In that case the court below had approved the trial court's denial to a defendant of certain reports made by the FBI to the Department of Justice. This Court, upon a consideration of the entire record and the confession of error by the Solicitor General, reversed. The reversal came after the enactment of Title 18 U. S. C., Section 3500, notwithstanding that such reports are obviously not within the definition contained in Subsection (e) of that statute. The decision below is, therefore, in direct conflict with this Court's decision in *Scales*.

Further, there is nothing in the affidavits submitted by the prosecutor to the court below—and certainly nothing in the record—which indicates that the alleged Carlin summary is not "a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with the making of such oral statement." Title 18 U. S. C., Section 3500(e)(2). Nor could the court below have reasonably reached a conclusion to the contrary without a thorough examination of

everyone involved with the preparation of the alleged summary. This, of course, the court below failed to do.

In *United States v. Waldman* (D. C., N. J., 1958), 159 F. Supp. 747, the government claimed that a report of a government agent about his interview with a witness for the prosecution did not meet the description of Subsection (e). It appeared, evidently on a hearing before the trial judge, that the government agent had taken long-hand notes while interviewing the witness, had later elaborated on these notes and had then made a transcription of his notes and elaboration in the form of a report. Judge Hartshorne, the District Judge, held that in view of the legislative history of the statute, such a report was clearly subject to production. In interpreting the meaning of paragraph 2 of Subsection (e), the court stated (p. 749):

> "Of course, by the 'substantial verbatim recital,' 'verbatim' is not meant. It need not be word for word. It need not use exactly the words of [the witness], nor mean [the witness's], words be used in their exact grammatical phrasing. That would prevent the use of any narrative statement. What is meant is, that the statement should give the substance of what [the witness] said; should give it, so far as the substance is concerned, substantially in [the witness's] words."

C. The Error Depriving Petitioner of the Right to Examine the Carlin Summary Was Prejudicial Whether or Not It Is Available to Petitioner Upon a New Trial.

The reasoning of the court below in holding the trial court's refusal to give petitioner the Carlin summary on the grounds that it would not be discoverable to him in the event of a new trial emphasizes the harmful effect of error as to petitioner.

Of course, it is evident that had the court below not erred, petitioner would have been entitled to make full use of the information therein contained in order to cross-examine a witness who gave most damaging testimony as

to the inception of the conspiracy and the manner in which it was to be carried out. In this respect, this Court's attention is called to the fact that the opinion of the court below does not contend that the summary did not contain information useful to petitioner, nor does it contend the summary contained irrelevant or extraneous matter. It seems most apparent that the error which deprived petitioner of a most valuable right can hardly be called harmless.

CONCLUSION.

The decision of the Court below opens wide the gate for mass trials of separate conspiracies with the conviction of defendants assured because of the high degree of probability of the transfer of guilt from a group to one not a member of it. The court below has not yet recognized the teachings of this Court that in complicated cases one cannot be insulated by a court's instruction from such a transfer. In effect this decision really permits one to be convicted on the acts and declarations of those with whom he has no conspiratorial association. The conspiracy dragnet is thus further widened.

In addition, it is respectfully submitted that the procedure followed by the court below, in examining *ex parte* documents *de hors* the record furnished it by the prosecutor, is shocking and deprived petitioner of basic and valuable rights. This procedure ought not to have the imprimatur of this Court placed upon it. Further, the attempt of the court below to limit the effect of this Court's decision in *Jencks* and the statute clarifying it should be vigorously rebuffed.

It is earnestly urged that this petition for Writ of Certiorari be granted.

Respectfully submitted,

ANTHONY BRADLEY EBEN,
Counsel for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS

For the Second Circuit.

No. 283—October Term, 1957.

(Argued April 29, 1958 Decided August 11, 1958.)

Docket No. 24809.

UNITED STATES OF AMERICA,

Appellee,

vs.

HARRY LEV, MARVIN RUBIN, MAURICE ADES AND RAYMOND WOOL,

Defendants-Appellants.

Before:

CLARK, *Chief Judge,* and
HINCKS and STEWART, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge.*

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from their convictions of conspiracy to defraud the United States, 18 U. S. C. § 371, and Rubin also appeals from his conviction of bribery, 18 U. S. C. § 201. Affirmed.

Arthur H. Christy, Chief Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and Fioravante G. Perrotta and Joseph T. Altier, Asst. U. S. Attys., New York City, on the brief), for appellee.

Milton S. Gould, of Gallop, Climenko & Gould, New York City (George Trosk, of Gallop, Climenko & Gould, New York City, on the brief), for defendant-appellant Harry Lev.

John T. Sullivan, New York City, for defendant-appellant Marvin Rubin.

Thomas J. Short, of Dougherty, Ryan & Mahoney, New York City, for defendant-appellant Maurice Ades.

Albert H. Treiman, New York City, for defendant-appellant Raymond Wool.

CLARK, *Chief Judge:*

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from a verdict and judgment of conviction for conspiracy to defraud the Government in violation of 18 U. S. C. § 371. Rubin also appeals from a conviction for bribery in violation of 18 U. S. C. § 201. The defendants were indicted for a single conspiracy to defraud the United States in the administration and procurement of Government contracts. Alleged errors involve principally a claimed variance between a charge of a single conspiracy and proof of two, and a failure to order a statement from a Government witness delivered to the defense for use in cross-examination. Ades and Wool also claim an insufficiency of the evidence, as does Rubin with respect to the bribery charge.

The proof adduced at the trial below tended to show overt acts between February 1952 and about August 1953 involv-

ing the procurement and administration of two contracts awarded to Bonita Originals, Inc., for the manufacture of Army garrison caps, and overt acts in the period commencing in April 1953 and continuing on into 1954 involving the procurement and administration of a contract awarded to Spencer Manufacturing Corporation for the manufacture of white hats for the Navy. During the former period Ades was the president and owner of 50 per cent of the stock of Bonita, Rubin was employed by Bonita on a profit-sharing basis to deal with Government officials on the garrison cap transaction, and Wool, an Army officer in the Quartermaster Corps, was assigned the Bonita contracts for administration until they were completed. Lev was not involved in either the procurement or the administration of the Bonita contracts. But Lev, Ades, and Rubin were all interested in Spencer Manufacturing Corporation and involved in the procurement and administration of the white hat contract. Wool was appointed a Contracting Officer of the Armed Services Textile and Apparel Procurement Agency (ASTAPA) prior to the award of the white hat contract and participated in both the award and the administration of that contract. On this proof Judge Kaufman, for the defendants' benefit, charged the jury that in fact two separate conspiracies were involved—the Bonita conspiracy and the white hat conspiracy—although he expressed doubts as to whether it was improper to characterize the conspiracy as a single one.

Defendants urge that a fatal variance occurred between the indictment and the proof concerning the number of conspiracies, and that this error was compounded by confusion on this point in the court's charge to the jury. A claim of variance is not unusual in a conspiracy case, *United States* v. *Rosenberg*, 2 Cir., 150 F. 2d 788, 793, certiorari denied 326 U. S. 752, and the courts have not evolved clear lines for distinguishing single and multiple conspiracy situa-

tions. Cf. *Blumenthal* v. *United States*, 332 U. S. 539; *Berger* v. *United States*, 295 U. S. 78; *Kotteakos* v. *United States*, 328 U. S. 750; *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, certiorari denied *Cohen* v. *United States*, 323 U. S. 799; *Monroe* v. *United States*, D. C. Cir., 234 F. 2d 49, certiorari denied 352 U. S 873; *Canella* v. *United States*, 9 Cir., 157 F. 2d 470. Here, although from Lev's vantage point the Bonita transaction was completely separate from the white hat transaction, from the viewpoint of the other appellants the conspiracy was a single one to defraud the Government in matters of war contracts. Thus as to Rubin, Ades, and Wool, who were involved in both transactions, there is, properly speaking, no variance. See *Canella* v. *United States*, *supra*, 9 Cir., 157 F. 2d 470; *cf. Blumenthal* v. *United States*, *supra*, 332 U. S. 539.

As Lev was involved only in the latter transaction, a more serious question of variance does arise as to him. In *Berger* v. *United States*, *supra*, 295 U. S. 78, 82, and *Kotteakos* v. *United States*, *supra*, 328 U. S. 750, 757, the Supreme Court set out the applicable rule in these circumstances: "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'effect the substantial rights' of the accused." In this Circuit the test applied has been stated as whether the conspiracies ultimately proved might have been joined in a single indictment and whether the trial was conducted so as to protect the right of defendants who are not common to all conspiracies. *United States* v. *Cohen*, *supra*, 2 Cir., 145 F. 2d 82, 89. Although Lev claims that the confusion inherent in the indictment was compounded by the court's instructions, a thorough reading of the charge shows that Judge Kaufman was scrupulous in protecting Lev's rights. In fact it is apparent that the jury was able to differentiate between the evidence relevant to defendants involved in only one of the conspiracies, for it acquitted

defendant Pollock, who was alleged to be involved solely in the Bonita affair. It follows that the variance here was not prejudicial and was at most harmless error.

Ades and Wool claim that the evidence linking them to the conspiracy was insufficient to justify admitting in evidence against them the admissions of other conspirators. Two witnesses for the prosecution gave important evidence involving particularly statements by Rubin defining and particularizing the use of funds to pay for entertainment of and gifts to the Government inspectors. These were Carlin, accountant for Bonita, and Levy, secretary-treasurer and co-owner of Bonita. Levy's testimony particularly went into details of funds drawn by him for uses which Rubin's directions and explanations to him showed were improper, definitely bringing the others, notably Ades and Wool, into the conspiracy. Hence we must consider the independent evidence supporting the inference of participation in the conspiracy and justifying the receipt of this testimony against them.

The independent evidence linking Ades to the illegal plot shows that he was present at a meeting with Rubin in the spring of 1952 where Rubin allegedly stated that he would need 5 to 7 per cent of the contract price in order to entertain Government personnel. Ades then went to Puerto Rico, where he managed the factory which manufactured the caps and hats supplied the Government. There is testimony that, while running the plant in Puerto Rico, he induced a Government inspector, Ienni, to live at his apartment rent free; that he brought another Government employee named Schlesinger to Puerto Rico secretly under an alias; that he attempted to bribe another inspector, Watkins; that he wrote a letter attempting to have Forcillo, a Government inspector, removed because he was too tough; and that, even before the white hat contract was awarded, he was bragging that they would receive it.

As to Captain Wool, the proof was that he went to visit Rubin's office several times; that as the officer supervising the procurement he granted valuable contractual deviations whenever they were requested, both in the Bonita contract and later to Lev; that he had several meetings with Lev before the opening of the bid on the white hat contract; and that as contracting officer he approved Lev's bid, although the pre-award survey showed that Lev had no machinery at all in Puerto Rico to manufacture the hats. There was testimony that in May or June 1953 Wool came to the Bonita office and took a topcoat and again, some children's dresses. There was further evidence from Rubin's doctor, Dr. Franklin, who testified that Rubin introduced Wool to him and that he treated Wool on nine separate office visits and rendered a bill for $265, which was paid by a check from the Bonita Corporation for $285 (thus including $20 for Rubin himself). Later when Rubin came to testify he said that Wool's affliction was deep-seated and of long standing, which no Army doctor had been able to reach, but which Dr. Franklin proceeded to cure by this course of treatment. This evidence stands uncontradicted on the record, and Wool (who did not testify) offered no satisfactory explanation of Bonita's making this payment for him. There was also considerable circumstantial evidence tending to show, when coupled with testimony as to statements made by an alleged coconspirator, that a month after the white hat contract was awarded Lev advanced him $5,000, which he used to complete payments on the purchase of a house. Later in testifying to a Senate committee investigating these frauds he claimed to have borrowed money and given a note to one Luciano, who denied this in testifying below. This testimony was presented by the Government to show consciousness of guilt. Thus the evidence offered as to both Ades and Wool presents amply sufficient groundwork for the admission of testimony of

statements by coconspirators and in particular for Levy's terribly devastating testimony, which, when believed by the jury, left no question of guilt.

Defendants Lev and Rubin assert that the trial court committed reversible error in refusing to order the Government to produce for their inspection a statement made by Government witness Carlin to agents of a Senate investigating committee. Since the decision in *Jencks* v. *United States*, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony. But before a new trial is to be ordered, we must see if the statement is in any event discoverable. Although the statement is not a part of the lower court record, the prosecutor—who did not have it at the trial—has procured from the Senate committee and presented to us in a sealed envelope a verified copy of a Senate investigator's summary of an interview with Carlin. An additional affidavit establishes that this summary is the only written record made of Carlin's interview, and that it was written following the interview and is not a substantially verbatim record of Carlin's statement. We have examined the summary, and internal evidence from it tends also to bear this out.

While defendants may perhaps have been given a right to inspect a statement of this nature by the *Jencks* decision, *supra*, 353 U. S. 657, 668,[1] the recent codification of discovery in this situation allows a defendant to examine only the following:

1. Here the Court said: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial." While not specified, it seems inferable that the F. B. I. recording of the reports made orally was contemporaneous with the making of the oral statements.

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement" 18 U. S. C. § 3500 (e)(1)(2).

As this statute will apply on a new trial of any of these defendants, and as under it discovery of the summary cannot be required, the trial court's error is rendered harmless. *United States* v. *Miller*, 2 Cir., 248 F. 2d 163, certiorari denied *Miller* v. *United States*, 355 U. S. 905.

There remains to be discussed Rubin's contention that there was insufficient evidence for the jury to have convicted him of bribery. We think the evidence quite sufficient. There was proof that Chief Inspector Porreca, whose duty it was to assign inspectors, upon a request had removed Forcillo from Puerto Rico and replaced him with a more lenient man. Thereafter Rubin sent Porreca a deep freeze, for which Bonita paid. Porreca later received some meat to put in the freezer. He testified that he never paid for any of this, nor was he ever asked to pay for it. This was enough evidence of violation of the bribery statute, 18 U. S. C. § 201. The defense efforts to show that nothing Porreca did actually defrauded the Government are irrelevant as the statute shows.

This important trial discloses a sad and sordid picture of Government agents yielding to rather cheap temptation, some willingly, some only under pressure. But there is another side to the story, of inspectors who stood out at all times against such debauchery of their obligations and who were transferred to other activities for their pains. It is to be hoped that they received no permanent setbacks in their careers, but eventually were accorded that proper respect which they so richly merited.

Convictions affirmed.

UNITED STATES COURT OF APPEALS

For the Second Circuit.

UNITED STATES OF AMERICA,
Appellee,

-v-

HARRY LEV, et al.,
Appellants.

State of New York,
County of New York,
Southern District of New York--ss.:

ARTHUR H. CHRISTY, being duly sworn, deposes and says:

1. He is Chief Assistant United States Attorney for the Southern District of New York and, as such, is fully familiar with all the proceedings heretofore had in the above-captioned matter.

2. He was the prosecutor at the trial of *United States v. Lev, et al.*, in March and April, 1957.

3. During the course of the trial, a demand was made for a statement allegedly signed by Government witness Melvin Carlin and given to investigators of the Senate Permanent Subcommittee on Investigations, Jack S. Balaban and L. L. Poole. At the time such demand was made, your deponent did not have in his possession any signed statement by the Government witness Carlin, nor any report of an interview of Carlin by Senate investigators; nor was your deponent aware that there was in existence either a signed statement or a report of an interview.

4. Following the decision in *Jencks* v. *United States*, 353 U. S. 657, decided in June 1957, your deponent communicated with the Senate Permanent Subcommittee on Investigations to determine if the Subcommittee had in its possession a statement signed by Carlin or a report of an interview with Carlin.

5. Your deponent was advised that a search was made through the files of the Senate Permanent Subcommittee on Investigations and that no statement signed by Carlin was located.

6. Your deponent was advised that Senate investigators Jack S. Balaban and L. L. Poole had interviewed Carlin on one occasion and had prepared a memorandum for Chief Counsel Robert F. Kennedy which contained a report of their interview with Carlin. The Senate Permanent Subcommittee on Investigations advised your deponent by letter that no signed statement by Carlin could be found, and such letter is attached to and made a part of this affidavit.

7. The Senate Permanent Subcommittee on Investigations, at your deponent's request, forwarded a copy of the memorandum prepared by Jack S. Balaban and L. L. Poole. This memorandum, containing a report of an interview with Carlin, was prepared on March 17, 1955, by Jack S. Balaban and L. L. Poole. A copy of the memorandum furnished by the Senate Permanent Subcommittee on Investigations has been signed and dated by Jack S. Balaban and it is contained in a sealed envelope attached hereto and made a part of this affidavit. It may, of course, be opened by the Court for inspection.

8. Investigator, Jack S. Balaban, who interviewed Carlin has signed an affidavit stating that, to his knowledge, no signed statement was ever taken from Carlin and that the memorandum prepared by him following his interview with Carlin is the only one in the files of the

Senate Permanent Subcommittee on Investigations relating to an interview with Carlin. Balaban's affidavit is attached hereto.

/s/ ARTHUR H. CHRISTY

Sworn to before me this
4th day of April, 1958.

/s/ Jack Ballen
JACK W. BALLEN

Notary Public, State of New York
No. 41-0146400, Queens County
Term Expires March 30, 1959

State of New York,
County of New York,
Southern District of New York—ss.:

JACK S. BALABAN, being duly sworn, deposes and says:

1. He is an investigator employed by the Office of Comptrolier General of the United States and assigned to the Senate Permanent Subcommittee on Investigations of the United States Senate Committee on Government Operations. He has been so employed since 1935.

2. In his position as investigator, he was assigned to work on the investigation by the Subcommittee into the fraudulent practices in textile procurement in the military services, which investigation culminated in Hearings before the Subcommittee in 1955.

3. In the course of his work on the investigation into the procurement of certain garrison cap contracts awarded to Bonita Originals, Inc. in June, 1952, he had occasion to interview Melvin Carlin, a certified public accountant at 11 West 42 Street, New York, New York. Carlin was an accountant for Bonita Originals, Inc. With him at

this interview was another investigator of the Subcommittee, L. L. Poole.

4. Your deponent and L. L. Poole interviewed Carlin, whom your deponent is advised was a Government witness in the case of *United States* v. *Lee, et al.*, tried in the Southern District of New York in March and April, 1957, in Carlin's office in March of 1955.

5. This was the only interview your deponent recalls having with Melvin Carlin and, upon information and belief, it is the only interview investigator L. L. Poole had with Carlin.

6. At no time did your deponent obtain from Carlin a signed statement and, upon information and belief, at no time did L. L. Poole obtain a signed statement from Carlin.

7. L. L. Poole resigned as an investigator for the Senate Subcommittee in 1958 and his whereabouts are presently unknown to your deponent.

8. Following the interview with Carlin in March, 1955, your deponent prepared for Robert F. Kennedy, Chief Counsel of the Subcommittee, a memorandum of the interview with Carlin. In this memorandum your deponent summarized generally what Carlin had related to your deponent and L. L. Poole. This memorandum was not adopted nor approved by Carlin, nor is it a substantially verbatim recital of an oral statement made by Carlin.

9. This memorandum was prepared on March 17, 1955, and is the only memorandum prepared by your deponent in connection with the interview by your deponent and L. L. Poole with Carlin and is the only memorandum your deponent knows of in the files of the Subcommittee.

10. On this day, your deponent was shown a copy of the memorandum he and L. L. Poole prepared following

the interview with Carlin. Your deponent has signed his name and the date on each of the three pages of this memorandum.

/s/ JACK S. BALABAN

Sworn to before me this
4th day of April, 1958.

/s/ Jack Ballen
JACK W. BALLEN

Notary Public, State of New York
No. 41-0146400, Queens County
Term Expires March 30, 1959

[Letterhead of]

UNITED STATES SENATE.

Committee on Government Operations
Senate Permanent Subcommittee on Investigations
(Pursuant to S. Res. 37, 85th Congress)

March 25, 1958

Mr. Arthur H. Christy
Chief of the Criminal Division
Southern District of New York
U. S. Court House
Foley Square
New York, New York

Dear Mr. Christy:

A check has been made of all references in the possession of this Subcommittee concerning Melvin Carlin and no record has been found of any interrogatory or interview other than that of Jack Balaban. I trust that this is the information you desire.

Very truly yours,

/s/ DONALD F. O'DONNELL
Donald F. O'Donnell
Acting Chief Counsel

UNITED STATES COURT OF APPEALS
For the Second Circuit.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of August, one thousand nine hundred and fifty-eight.

Present:

Hon. Charles E. Clark, Chief Judge.
Hon. Carroll C. Hincks, Circuit Judge.
Hon. Potter Stewart, Circuit Judge.

United States of America,
Plaintiff-Appellee,
vs.
Henry Lev, Marvin Rubin, Maurice Ades and Raymond Wool,
Defendants-Appellants.
Joseph G. Porreca, Eric C. Farnell, Mella Hort, David Pollack and George A. Earnshaw,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

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NOV 17 1958
JAMES R. BROWNING, Clerk

Nos. 435, 436, 437

In the Supreme Court of the United States

OCTOBER TERM, 1958

HARRY LEW, PETITIONER

v.

UNITED STATES OF AMERICA

RAYMOND WOOL, PETITIONER

v.

UNITED STATES OF AMERICA

MARVIN RUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM ANDERSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 435, p. 31; Pet. 436, p. 28; Pet. 437, p. 21), is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1958. On September 9, 1958, Mr. Justice Harlan extended the time for filing petitions for a writ of certiorari to and including October 10, 1958 and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether there was fatal variance where the indictment charged one conspiracy, the proof showed that there might have been two conspiracies in which all but one of the petitioners participated, and the court charged that there were two conspiracies.

2. Whether there was sufficient evidence to show the participation of petitioner Wool in the conspiracies.

3. Whether the court below properly found, by an *in camera* examination of a government report, that any error of the trial court in denying its production at trial was harmless error because the report was not a statement subject to discovery under 18 U. S. C. 3500.

STATUTE INVOLVED

18 U. S. C., Supp. V, 3500 provides:

> SECTION 3500. *Demands for production of statements and reports of witnesses.*—(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than th defendant) to an agent of the Government shall be the subject of sub-

pena, discovery or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose

of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

Count 1 of a three-count indictment, returned in the United States District Court for the Southern District of New York, charged petitioners and six

others with a conspiracy in violation of 18 U. S. C. 371, to defraud the United States with respect to the administration and procurement of government contracts. Counts 2 and 3 charged petitioner Rubin with bribery in connection with the contracts in violation of 18 U. S. C. 201 (Pet. 436, pp. 36–41). After a jury trial petitioners and two co-defendants, Ades and Hort, were convicted under the conspiracy count.[1] Petitioner Rubin was acquitted as to bribery under the second count but convicted under the third (R. 4178–4179).

Petitioner Lev was sentenced to serve nine months imprisonment and to pay a fine of $5,000; petitioner Wool to eighteen months and a fine of $1,500; and petitioner Rubin to fifteen months each on the first and third counts, to run concurrently, and a $1,000 fine on the first count (R. 4262–4265). On an appeal by petitioners and co-defendant Ades, the convictions were affirmed (Pet. 435, p. 31; Pet. 436, p. 28; Pet. 437, p. 21).

A. THE EVIDENCE

1. *The cap contract.* In 1952, petitioner Rubin was working for a firm for which he had obtained several Navy contracts in return for 33-1/3 per cent of the company profits (R. 410, 1913). In the early part of the year he was contacted by the officers of Bonita Originals, Inc., a New York firm manufacturing dresses in Puerto Rico, which had suffered business losses and was interested in obtaining gov-

[1] One co-defendant entered a plea of guilty and testified as a prosecution witness; one was acquitted. A motion to sever was granted as to two others.

ernment contracts (R. 300, 373, 3089, 3094–3095). He had many meetings with the officers—Ades, the president (and a co-defendant in the action), Levy, the secretary-treasurer, and Carlin, an accountant who had initially suggested that Rubin could get the government contracts they needed (R. 314, 406–407, 3095). Rubin told the officers that he would get all the Army contracts they could handle in return for 50 percent of the profits accruing from the work (R. 307, 315, 408, 3097). He said that 5 to 7 per cent of the face value of the contracts would be needed for gifts and entertainment for government personnel in order to get the contracts and to avoid any difficulties with the government in their performance (R. 312–313, 412). He spoke specifically of his contacts at the New Quartermaster Procurement Agency (NYQMPA), which during the period here described (specifically in October, 1952) became known as the Armed Services Textile and Apparel Procurement Agency (ASTAPA) and which until its demise in October, 1953, handled procurement for all the armed forces (R. 176, 307). Rubin mentioned the names of "Major Farnell", a contracting officer and "Mella Hort" a clerk in the contract administration branch of the agency (R. 314).

The Bonita officers accepted Rubin's proposal when he agreed to take 33-1/3 per cent, instead of 50 per cent, of the profits (R. 309, 3100). After Rubin brought them samples of various Army garments, they decided that the company would bid through the NYQMPA on three contracts for the Army garrison cap because it was a relatively simple item to man-

ufacture in the company plant at Puerto Rico (R. 414, 415). Rubin assured the others several times "We will get it. Don't worry about it" (R. 416, 420). Rubin was to handle the bidding exclusively (R. 416–417, 3197).

In June, 1952, Bonita was awarded all or part of the three different contracts for the manufacture of over one million garrison caps (R. 417, 3198). The award to Bonita of two of the three contracts had been recommended by NYQMPA contracting officer, Major Eric Farnell, who had supervisory authority over the issuance, review and evaluation of bids, the making of awards and the administration of contracts (R. 157, 163–164, 179–180). The clerk, working under the contracting officer's supervision and having charge of the administration of the three contracts, was Mella Hort (R. 165–166, 190).

After the award of the contracts the company president, Ades, took over the management of the plant in Puerto Rico where the caps were to be made. Levy, the secretary-treasurer, remained in New York with Rubin, who was to be in complete charge of liaison with the procurement agency (R. 357, 416, 358–359, 420, 1074, 3197). Almost immediately, Rubin requested money from Levy, to reward the government personnel who had aided him in securing the contracts (R. 318, 422–423). Rubin suggested that Levy record the payments in Arabic and that he charge the sums to travel and entertainment on the company's books (R. 433). He told Levy that an initial sum of $1,000 which had been turned over to him had been paid to

Major Farnell (R. 433). In Levy's presence, he gave a $500 payment to an NYQMPA accountant, Pollack, who had likewise recommended the awards (R. 157, 165, 426–427, 431). In September 1952, Rubin gave $100 to Mella Hort, which was entered on company books as a $99.70 charge to travel and entertainment (R. 439–440). At this time Hort prepared a document authorizing the government's acceptance of 37,000 defective hats manufactured by the company at a reduction of one cent per hat (Govt. Ex. 8–D; R. 111). Thereafter, numerous payments of sums of money, one as high as $1,500, were made to Major Farnell, Mella Hort, Pollack and other procurement agency employees (R. 496, 499, 521–530, 538).

In November, petitioner Wool and Mella Hort, at Rubin's request, changed the delivery schedules to give Bonita more time to complete its contracts without penalty (Govt. Ex. 3–B; R. 106). In February, 1953, petitioner Wool, Mella Hort and Major Farnell prepared the authorization accepting some 2,000 defective Bonita-made caps at one cent per hat reduction in price (Govt. Ex. 6–B; R. 109). Petitioner Wool, an Air Force captain, came to work at the agency in September 1952, succeeding Major Farnell as the contracting officer on the Bonita contracts (R. 89). In December 1952, Bonita's secretary-treasurer, Levy, recorded in his Arabic notes that Captain Wool had been given $200 upon Rubin's request because Wool was going to help them in the future (R. 504).

In addition to outright payments of money, Rubin, with company funds, plied procurement agency employees with gifts during this period. A deep freeze,

large quantities of meat, and lingerie went to Porreca, an agency chief inspector who controlled the assignment of all inspectors (R. 510–511, 513, 1205, 1227–1228). Porreca, at Rubin's request, transferred elsewhere a subordinate assigned to the company's Puerto Rican plant whom Ades had found difficult and replaced him with a new plant inspector whom Rubin had suggested (R. 444–445, 1213–1226). The new plant inspector, who was living "like a king," rent free in Ades' house during his three months' inspection duty, "cooperated" fully, even to the point of sending defective caps to Rubin instead of to his superiors (R. 1224, 1351–1356).

Rubin, in New York, purchased clothing for Mella Hort and for her children (R. 466–470). Both she and, later, petitioner Wool visited the Bonita offices frequently. On one occasion, Wool picked up an overcoat for himself and another time children's garments which Ades had sent from Puerto Rico (R. 471, 550–552).

In June, 1953, Bonita paid Wool's medical bills amounting to some $265 (R. 543–545, 1145). On Rubin's instructions, the Bonita secretary omitted the designation "Dr." before the doctor's name on the check and charged the amount on the company books to professional fees (R. 546, 1087). Rubin told Levy that Captain Wool had been visiting him (Rubin) when he became ill, that he had gotten his own family doctor to take care of Wool and that Bonita should pay the bill because it needed more work and Wool was trying to get a contract for them which another firm was performing (R. 543–544).

At about this time, Wool and Hort visited this other firm threatening it with cancellation of its government contract unless it met its delivery schedules on garrison caps or subcontracted to another company (R. 3587–3588). The firm was forced to subcontract. Bonita got the subcontract (R. 167–168). Mrs. Hort told Levy that she and Wool had "worked hard" to get the subcontract for Bonita (R. 570–571).

In the summer of 1953, Bonita received its final payment on the garrison cap contract after having sent to Puerto Rico, at company expense and compensation, a government property specialist who discovered and ironed out discrepancies in inventory (R. 1165–1166, 1170–1171).

2. *The white hat contract.* In December, 1952, and again in April, 1953, while Bonita was fulfilling its cap contracts, the procurement agency received requests for the purchase of nearly 7 million enlisted men's white sailor hats, and 7 thousand midshipmen's white hats (R. 168). An invitation to bid was issued on April 23, 1953 (R. 169). Petitioner Wool was assigned as the contracting officer (R. 165–166).

Petitioner Rubin learned of the government purchase authorizations, despite their classified nature, long before the invitation to bid was issued (R. 571–572, 2059). He discussed with Levy the possibility of Bonita submitting a bid but Levy refused because he felt that Bonita was not equipped to handle such work (R. 576, 578).

In early April, some three weeks before the invitation to bid had been issued, petitioner Lev, the owner of the Mid-City Uniform Cap Company in Chicago,

(R. 580) met with Rubin in the home of Mella Hort. They discussed the possibility of bidding on the white hat contract (R. 1523–1524). Rubin described to Lev the advantages of manufacturing in Puerto Rico (R. 2077–2078).

Several days later, Rubin and Lev met in an automobile a short distance from ASTAPA headquarters. Lev signed a check for $2,000 made payable to Mrs. Hort's husband (R. 1511–1512, 3412–3414). Although the defense later claimed that this check was given as an advance on an unmaterialized resin enterprise (R. 1520, 3415), Rubin told Levy that Lev had given the check, as well as clothing from Saks Fifth Avenue and cash of $400 or $500, to Mella Hort in connection with the white hat contract. Levy recorded this in his Arabic notes (R. 617–620, 663).

After further meetings between Lev and Rubin in Chicago and in New York, it was decided that they would bid on the white hat procurement (R. 2083, 2087, 2092–2094). Lev was to receive 51% of the profits; Rubin and Ades (who flew in from Puerto Rico to attend the New York meeting of Lev and Rubin) were to share the remaining 49% (R. 594; Govt. Ex. 67, R. 2100). Rubin told Levy that he and Ades would bring their profits into Bonita (R. 592, 597). He also told Levy that Wool and Hort were assisting them in getting this contract (R. 606).

Ades immediately began negotiations with Puerto Rican authorities for an option on some newly-constructed government-owned factory buildings (R. 1550–1551). He told the authorities that Lev, his new partner, was in the process of receiving an award

from the United States Government for the manufacture of Navy hats—this even before Lev had submitted a bid. Negotiations for the option were completed on May 1, 1953.

Four days later, on May 5, 1953, the bid was submitted on the entire quantity on an all-or-nothing basis (R. 169, 2097). This was the last day for the submission of bids and this was the lowest bid (R. 2096).

ASTAPA ordered a pre-award survey to be made of Lev facilities in Puerto Rico to determine whether they were sufficient (R. 1242). Rubin asked Chief Inspector Porreca to expedite the survey (R. 1242). Although the survey report revealed that Lev and the others had absolutely no machinery in the plants and no personnel on hand, it concluded that the facilities were adequate (Gov't. Exs. 14–F, 14–H; R. 123). Porreca, reviewing this report, told Rubin there might be certain difficulties because of the lack of machinery (R. 1244). Rubin assured him that there would be no difficulties because Raymond Wool was assisting them, stating, "Ray is one of the boys. What are you worried about?" (R. 1244–1245).

On May 20, 1953, on petitioner Wool's recommendation, the entire contract was awarded to Lev (R. 170).

Shortly thereafter, Wool called the Bonita office and spoke to Rubin (R. 607–8). Rubin told Levy at this time that Wool was upset because he had received only $1,000 from Lev and that he was supposed to receive $5,000 (R. 608–609). Rubin then called Lev and told him that Wool was complaining

(R. 609). Lev withdrew $8,000 from his Chicago bank (R. 1416) and came to New York on June 29, 1953 (R. 1193–1194). He met Rubin, Wool and Mrs. Wool at a restaurant where he handed Mrs. Wool $5,000 in cash (R. 610–612). Shortly thereafter the Wools made a $5,900 cash payment on a home (R. 1419–1420).[2]

During that month, Lev requested permission to have government-furnished material to be used in his manufacturing process shipped in domestic packaging rather than the export packaging which his contract called for (R. 171). Wool granted such permission, making it possible for Lev to save $41,000. Wool also granted permission for Lev to ship the finished hats back to this country in less expensive packages, saving Lev some $21,000 (Gov't. Exs. 16–A, 16–K; R. 79, 138, 171, 1705–1716). Porreca, who had been given $1,000 by Lev, had another (see p. 9 *supra*) "difficult" inspector reassigned at Rubin's request (R. 1253–1254). Lev was delinquent in meeting delivery dates and a substantial number of the hats were defective (R. 1573–1578, 1645–1646, 1618–1650, 1811–1819).

B. THE CHARGE

After the trial court, in its instructions to the jury, set out certain general principles as to the law of conspiracy (R. 4035–4039) it discussed the government's

[2] The government showed that Wool, in a Senate hearing, explained his personal finances during this period by stating that he had borrowed $9,000 from one Luciano, giving him a note for $5,000 (R. 1483–1486). Luciano denied having lent this amount or having received such a note (R. 1489–1490).

evidence as to "one such agreement" (R. 4040), the evidence relating to existence of the Bonita conspiracy. Thereupon the court stated (R. 4042):

> Before we discuss the defendants' position, you will note that I did not refer to any matter involving the defendant Lev in discussing the evidence as to whether or not there was a so-called Bonita conspiracy. This was deliberate. It is important that you keep Bonita matters distinct from the white hat matters. I will discuss this more fully subsequently. Since the defendant Lev was not involved in the Bonita transactions, you must determine whether or not there was a so-called white hat conspiracy before you may convict him and you must disregard as far as Lev is concerned any evidence concerning the Bonita transaction.

The court next discussed evidence as to the existence of the "white hat" conspiracy (R. 4042–4049), concluding (R. 4049–4050):

> If you find beyond a reasonable doubt that the alleged conspiracies existed, you then come to the next essential element that the Government must also prove beyond a reasonable doubt. * * *
>
> Before you may convict any defendant it must be shown beyond a reasonable doubt that the particular defendant was a member of the alleged conspiracy.

The court explained, and used an illustration to show, under what circumstances declarations and acts of co-conspirators might be admissible, if at all, against a defendant (R. 4050–4053). Stressing the fact that the government must satisfy the burden of

showing individual membership in a conspiracy, with knowledge and intent, the court discussed the defendants separately, saying *inter alia* (R. 4053–4054):

> As to the defendant Lev, I have already instructed you, and I repeat, you must not consider any of the Bonita transactions, that is, Bonita testimony or exhibits in determining the guilt or innocence of the defendant Lev. As to him, you must only consider whether there was a so-called white hat conspiracy to defraud the United States in the exercise of its governmental function of administration and procurement of government contracts, and whether the defendant Lev was a member of such a conspiracy.
>
> In determining whether or not Lev was a member, you must consider only the independent evidence against him. In view of the length of the trial and in order to avoid any possibility of confusion on your part, I will endeavor to refresh your recollection as to some of the independent evidence. I am sure that it is unnecessary for me to repeat this again, but I shall.

The court thereupon reviewed the independent evidence as to each of the defendants, stating the positions of each (R. 4054, *et seq.*).

After a recess, the court briefly reviewed the law which it had covered, reminding the jury again *inter alia* (R. 4085):

> If you are convinced that there was such a conspiracy involving Bonita but not white hat, or if there was a white hat conspiracy that Lev

> was not in it, then you must acquit the defendant Lev because he was not involved in the Bonita transactions.

After the jury had been out some time it asked (R. 4167):

> If a conspiracy existed on the Bonita contract and was not terminated by some act of the conspirators, does it then follow that:
>
> (a) The conspiracy continued during the course of the white hat contract.
>
> (b) There had to be a conspiracy on the white hat contract.

The reply was in part (R. 4167–4169):

> If you find that certain defendants were engaged in a conspiracy to defraud the Government during the period of the Bonita transactions, you may find that as to certain of these defendants there was a continuing unlawful scheme which continued on into the white hat transaction.
>
> * * * * *
>
> However, you will recall that I instructed you that with respect to the defendant Lev, that he was not a member of the alleged Bonita conspiracy, therefore, even if you find that there was a Bonita conspiracy, you may not convict Lev unless and until you find that there was a so-called white hat conspiracy to defraud the United States and that Lev was a member of such a conspiracy.

In affirming the convictions, the court below held that Wool's participation both in the Bonita transaction and the white hat transaction made the conspiracy a single one as to him, and that any variance as to Lev, who participated only in the white hat

transaction, was harmless error in that his rights were scrupulously protected by the trial court.

ARGUMENT

1. As appears from the Statement, *supra*, the evidence showed that the conspiracy which started with Bonita's cap contract was continued into the subsequent white hat contract, with one person (Pollack) withdrawing, and another, petitioner Lev, entering at the second stage. As to those involved in both phases of the conspiracy, including petitioner Wool, who raises a claim of variance here (Pet. 436, pp. 13–17), the conspiracy was, as the court below noted, one over-all conspiracy to defraud the government in the faithful execution of government contracts. It is true that Wool did not enter the picture until the later stages of the Bonita cap contract when he was assigned to duty in that area, but the evidence showed, and the jury was justified in concluding, that he entered in and adopted the conspiracy as it existed at that stage of the cap contract, and continued with it in its white hat phase. He thus joined the over-all conspiracy which embraced both contracts, and is in no position to claim any variance at all, much less a prejudicial variance. *Canella* v. *United States*, 157 F. 2d 470 (C. A. 9); *Quirk* v. *United States*, 161 F. 2d 138 (C. A. 8); *Monroe* v. *United States*, 234 F. 2d 49 (C. A. D. C.). See *Blumenthal* v. *United States*, 332 U. S. 539, 556–557, where this Court, after noting that conspiracies often "mature by successive stages which are necessary to bring in the essential parties", pointed out that "the law rightly gives room for allowing the

conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others."

Since, therefore, the core of the conspiracy was single, the claim by petitioner Lev of "mass trials of separate conspiracies" (Pet. 435, p. 12) is wholly unfounded. (See the Statement, *supra.*)

The situation here bears no relation to *Kotteakos* v. *United States,* 328 U. S. 750, where, although eight or more different conspiracies by separate groups of defendants having no connection with each other were proved, the trial judge instructed the jury that only one conspiracy was charged and that the acts and declarations of one conspirator bound all. In contrast to this case, in *Kotteakos* the distinct and disconnected agreements had neither a direction toward a single unlawful end nor common participants except for one central figure not on trial. Moreover, even treating the two aspects here as separate conspiracies, the "sheer difference in numbers, both of defendants and of conspiracies proven, distinguishes the situation", *Kotteakos, supra,* at 766, distinguishing *Berger* v. *United States,* 295 U. S. 78, where a variance was held immaterial under a factual situation more closely akin to the present. In the instant case at most only two conspiracies were proved as compared to over eight in *Kotteakos.* In *Kotteakos* thirty-two defendants were indicted and nineteen brought to trial as compared with nine defendants here indicted with six brought to trial. The

jury in *Kotteakos* considered the case against thirteen defendants; here it considered the case against six, four of whom were involved in both phases.

As to petitioner Lev, who was involved only in the later, separable, phase relating to the white hat contract, it may be that the two phases were separate conspiracies insofar as he is concerned. Whether the phases had to be considered separate or not, the judge did so treat them, taking scrupulous care repeatedly to instruct the jury that Lev could not be held responsible for acts occurring before the white hat contract. (See the Statement, *supra,* pp. 14–16.) The argument that the instructions were ambiguous and insufficient to protect Lev's rights (Pet. 435, pp. 20–21) is refuted by the record.

Despite the necessary length of the charge it was presented to the jury in a lucid and systematized fashion with individual attention given to each of the defendants. The law applicable to Lev as a participant only in the white hat conspiracy was stressed time and time again. (See the Statement, *supra,* pp. 14–16.) Contrary to the allegation of vacillation, the record shows consistent and punctilious efforts by the court to protect Lev. From the first point at which it appeared that evidence was being introduced with respect to transactions taking place before Lev's association with the group, the court pointed out that, in view of the nature of the conspiracy, he would upon occasion receive evidence subject to connection with a particular defendant (R. 100) and explained that, unless the government proved beyond a reasonable doubt that there was one conspiracy, cer-

tain evidence could not be considered against Lev (R. 115). He followed the practice of receiving evidence of the Bonita conspiracy only subject to connection, and he persistently reminded the jury, once at the insistence of Lev's counsel, that before any such evidence could be weighed against a defendant, the government would have to establish beyond a reasonable doubt by independent evidence that the defendant was a member of the conspiracy established (R. 402, 483, 539). He did indicate to counsel, out of the presence of the jury, his belief that the case might involve only one conspiracy, but said later that, for the benefit of Lev (R. 1537) and in the interest of "protection" and "conservatism", he had decided to charge on two conspiracies (R. 1844–1845, 1891–1892).

The cautionary explanations given at the time evidence was introduced, together with the final comprehensive instructions, adequately excluded the evidence of the Bonita conspiracy from consideration on the guilt of Lev.[3] Cf. *Blumenthal* v. *United States, supra,* 332 U. S. 539; *Paoli* v. *United States,* 352 U. S. 232.

2. There is no merit to petitioner Wool's assertion that there was insufficient evidence to connect him with conspiracy. We find no need to review here in detail the independent evidence against Wool, set out by the court below (Pet. 436, p. 33) and admitted in part by him (Pet. 436, pp. 21, 22). Taking the evidence as a whole, the jury had a right to conclude that

[3] Obviously the Court of Appeals examined the entire record in reaching the conclusion that Lev's rights had not been substantially affected. There is no merit to Lev's contention that the court below rejected his contention of variance *solely* on the basis that the two conspiracies could have been properly joined.

his close association with Rubin was not accidental and that he was not, in innocence, merely performing his duties as a United States contracting officer when he granted expensive contractual deviations to both Bonita and Lev, when he pressured another firm into subcontracting to Bonita, and when he approved Lev's bid to manufacture over seven million hats in spite of the fact that a pre-award survey showed that Lev had no machinery at all to manufacture the articles. Cf. *Paoli* v. *United States*, 352 U. S. at 236. This, coupled with the evidence of his acceptance of treatment from Rubin's doctor, paid for by Bonita, and the testimony of the man (Luciano) who denied being Wool's claimed source of enrichment during this period (see p. 13, fn. 2, *supra*), provided sufficient groundwork for the admission against him of statements made by co-conspirators. In totality, the evidence against him fully supports the verdict.

3. Carlin, an accountant for Bonita, testified as a government witness. In addition to identifying company records, he gave testimony principally concerning the initial meetings which culminated in the decision of the company officers to avail themselves of Rubin's services (R. 296–330). On cross-examination by Rubin's counsel, he testified that investigators of a Senate Committee had come to his office at a time he could not specify other than as about six months before the hearings in Washington. He said that he gave them a statement and believed that he had signed it. Counsel for Rubin then requested production of the statement. This was denied on the ground that no proper foundation had been laid (R. 342–343), a rul-

ing which antedated this Court's decision in *Jencks* v. *United States*, 353 U. S. 657.

Subsequently Carlin was asked about his testimony before the Senate Committee at open hearing, which had been recorded (R. 380–381), and was cross-examined with regard to specific statements made there (R. 380-387). Thereafter, out of the presence of the jury, counsel for Rubin again requested production of the statement allegedly made initially to investigators and the court denied the motion on the ground that there was not the slightest indication of inconsistency (R. 394–395).

On appeal, the United States Attorney, who did not have the statement in his possession at the time of the trial, filed with the Court of Appeals a sealed copy of the Senate investigator's summary of an interview with Carlin which had been obtained from the Committee,[4] and an affidavit to the effect that this was the only record of the interview and that it was not a substantially verbatim record (see No. 435, Pet. 37–38, 39–43). The Court of Appeals ruled that, while the trial court may have been in error in ruling that inconsistencies had to be shown before production was required, there was no occasion to reverse the convictions since, under 18 U. S. C. 3500, *supra*, pp. 2–4, the only record of the interview was not the kind of a statement whose production could be required at a new trial. This holding is challenged here by all three petitioners.

[4] The sealed copy of this summary has been forwarded to the Clerk of this Court by the Clerk of the Court of Appeals for the Second Circuit.

a. It should be noted at the outset that only Rubin moved for production of this document (R. 342) and no motion for the production of other documents now claimed to be relevant was made at the trial. The interest of the other petitioners in the subject matter of Carlin's testimony was so remote that it is understandable that they did not demand the report. Indeed, counsel for petitioner Lev elicited from Carlin on cross-examination the fact that he had nothing whatever to do with Lev (R. 331, 333). Moreover, the testimony of the witnesses recorded before the Senate Committee was available at trial and was used for impeachment purposes. Regardless of other considerations, error, if any, with respect to the statement was, in the light of the whole record, harmless. *United States* v. *Sheba Bracelets, Inc.*, 248 F. 2d 134 (C. A. 2), certiorari denied, 355 U. S. 904.

b. In any event, there was no error. While the trial court may have given the wrong reason for not requiring production, the ruling was correct both as of the time of trial and at present since there was, in fact, no statement of the witness which was available for impeachment purposes. Regardless of the subsequent legislation, which clearly covers the matter, we do not believe the decision of this Court in *Jencks* v. *United States*, 353 U. S. 657, required the production of a statement which does not purport to be that of the witness, but which is merely another's interpretation of what the witness has said, subject to all the infirmities that may arise in recording recollection. And certainly the Court of Appeals, in determining whether to grant a new trial, was justified in taking

into consideration the fact that at a new trial production of the document could not be required. *United States* v. *Palermo*, 258 F. 2d 397 (C. A. 2) petition for writ of certiorari pending, No. 471, this term; *Scales* v. *United States* (C. A. 4), decided October 6, 1958,[5] petition for writ of certiorari pending, No. 488, this term.

c. Petitioners' suggestion that summaries of agents are not "immunized" by the statute, was rejected by the Second Circuit in *United States* v. *Palermo*, *supra*, upholding a denial by the trial court of a request for production of a written memorandum prepared by a Treasury agent embodying the results of a conference between the agent and a key government witness. The court said that it was apparent from the record that the memorandum was made from memory by the agent and was not intended to be a "substantially verbatim recital" of anything said by the witness; that it was merely a summary of the agent's recollection of what had transpired at the meeting; that it was not signed, approved or otherwise adopted by the witness; and that the purpose of the statute was to limit the right of inspection to statements and reports for which the witness, not an agent, is responsible.

The legislative history of the statute, a substantial part of which is concerned with the definition of the statements which are subject to production, fully sup-

[5] In that case, the Fourth Circuit held the statute to be the controlling law, pointing out that it did not matter whether its relevancy provision was regarded as an addition to, or change in, the *Jencks* procedure since this Court in *Jencks* was announcing only an evidentiary rule, not a constitutional one.

ports this position. As offered in the Senate on August 22, 1957, the bill defined the type of statements which would be subject to disclosure as those which are: "signed by the witness or otherwise adopted or approved by him, and any transcriptions or records of oral statements made by the witness to an agent of the Government, relating to the subject matter as to which the witness has testified."[6]

The Department of Justice expressed strong opposition to the use of the word "records" which had been substituted for the word "recordings" appearing in an earlier version.[7] It pointed out that the word "records" might be construed to include reports and files generally, including internal working papers which would reveal investigative techniques and identity of informants and complainants—that it would "authorize the very rummaging through government investigative files that the legislation is intended to prevent." (See letter dated August 22, 1957 from then Acting Attorney General Rogers to Senator Eastland, Chairman of the Senate Committee on the Judiciary, 103 Cong. Rec. 15791.)

---

[6] The original version of the legislation, prepared by the Department of Justice and introduced as S. 2377, and as an amendment to H. R. 7915, defined the type of reports or statements which would be subject to disclosure as those which are: "Signed by the witness or otherwise adopted or approved by him as correct relating to the subject matter as to which he has testified."

[7] See the version reported on August 12, 1957 where statements were defined as those (103 Cong. Rec. 14457):

* * * "signed by the witness or otherwise adopted or approved by him, and any transcription or recordings of oral statements made by the witness to a Federal law officer, relating to the subject matter as to which the witness has testified.* * *"

Thereafter an attempt by Senator Dirksen to resubstitute the word "recordings" for "records" was defeated in the Senate after Senator O'Mahoney, sponsor of the legislation, argued that the requested change was of trivial importance since the word "records" was so limited in the context used (*i. e.*, "records of oral statements made by the witness to an agent of the Government") to afford protection against the fears expressed by the Acting Attorney General (103 Cong. Rec. 15930–15934).

The bill emerged from conference (the Senate and House being in disagreement) with the language of the present provision which defines the type of statements subject to disclosure as follows (103 Cong. Rec. 16487, 16738):

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> (2) a stenographic, mechanical, electrical, or other *recording,* or a transcription thereof, which is a *substantially verbatim recital* of an oral statement made by said witness to an agent of the Government and *recorded contemporaneously* with the making of such oral statement. [Emphasis added.]

This conference bill, its revised text meeting the approval of the Department of Justice (103 Cong. Rec. 16489), was agreed to by the Senate (103 Cong. Rec. 16489) and the House (103 Cong. Rec. 16742). Before its passage, Senator Javits, with the agreement of Senator O'Mahoney, observed on the Senate floor (103 Cong. Rec. 16488):

> As a practical matter, then, what has been done with the so-called records provision is to tie it down to those cases in which the agent actually purports to make a substantially verbatim recital of an oral statement that the witness has made to him—*not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him*, and as transcribed by him * * *. [Emphasis added.]

Representative Keating, pointing out that the conference bill fortified the position of the House members voting for a stronger bill, said, *inter alia* (103 Cong. Rec. 16739):

> * * * The conferees provided that the only statements a defendant could see, and when only in the courtroom were those actually signed or formally approved by the witness or a stenographic verbatim recital of a statement made by a witness which is recorded contemporaneously with the making of such oral statement. In other words, *only those statements need be produced in court by the Government which could be shown in court to impeach the credibility of the witness.* [Emphasis added.]

d. Petitioners allege that the Court of Appeals, in determining that the document in question was not a "substantially verbatim recital" of Carlin's statement within the meaning of subsection (e) (2) of 18 U. S. C. 3500, improperly conducted an *in camera* examination of it. There is no merit to this contention.

Admittedly the statute does not set up a procedure for resolving a conflict when the government claims

that a particular document is not a "statement" under subsection (e), nor did this Court in *Jencks* set forth the procedure to be followed when there is a dispute as to whether a statement is that of the witness. An acceptable course, however, is suggested by subsection (c) of the statute which provides a remedy for a defendant adjudged guilty who has been denied access to a part of a statement excised by the trial judge because of the government's claim that it was immaterial to the testimony. Under this procedure, on appeal, the entire text of the statement is sent to the appellate court "for the purpose of determining the correctness of the ruling of the trial judge". The Fourth Circuit has held that this provision affords due process and that its enactment is a reasonable exercise of Congressional power in protecting the right of the United States against disclosure of information which it is in the public interest to withhold so long as no pertinent information is withheld from the defendant. *Scales* v. *United States* (C. A. 4), No. 7637, decided October 6, 1958. See also *United States* v. *Gandia, et al.*, 255 F. 2d 454 (C. A. 2).

The same reason for permitting an *in camera* examination to determine relevancy would apply, we submit, where the claim is made, as here, that a document sought is not even the type of document which the statute requires to be produced. In the case of relevancy, the excision of a part of a statement is justified because it has no impeachment value. By the same token an entire document need not be turned over to the defendant when it is not the statement of the witness but that of an investigating agent. Nor have

petitioners been prejudiced by the failure of the trial court to examine the memorandum *in camera* since the appellate court has made the required determination *de novo*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

NOVEMBER 1958.

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IN THE

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OCTOBER TERM, 1958.

No. 435

HARRY LEV,
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vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit.

REPLY BRIEF FOR PETITIONER.

ANTHONY BRADLEY EBEN
135 South La Salle Street
Chicago 4, Illinois
Counsel for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

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— —

PRELIMINARY STATEMENT.

The government's brief raises questions as to the constitutionality of Title 18, Section 3500. In addition it completely overlooks the fact that the court below found that the trial court *was guilty of error on* both points relied on here by the petitioner. *U. S.* v. *Lev* (1958) (2nd Cir.) 258 F. 2d 9, 11, 13. Petitioner is, of course, in complete agreement with this finding but disagrees with the further finding of the court below, presumably pursuant to Rule 52, Fed. Rules, Crim. Proc., that both of these errors were harmless.

The questions to be determined here are whether or not these admitted errors were prejudicial to petitioner and in conflict with decisions of this Court. The refusal of the government to face up to this reality has led it to submit a brief in opposition which is completely unresponsive to the issues raised by petitioner.

I.

THE GOVERNMENT'S ARGUMENT THAT THE INSTRUCTIONS OF THE TRIAL COURT WERE PROPER AND THUS PROTECTED PETITIONER FROM THE IMPACT OF THE VARIANCE IS IRRELEVANT.

The government's sole answer to petitioner's contention that he was prejudiced by the variance is that the trial court's instructions were proper (Gov't. Bf. pp. 19, 20). Assuming *arguendo*, that this were a true statement, it hardly constitutes an answer to the asserted conflict between the court below and this Court in *Kotteakos* v. *U. S.* (1946) 328 U. S., 750 and *Paoli* v. *U. S.* (1957) 352 U. S. 232.

In the first place, *Kotteakos* establishes that a variance between a charge of one conspiracy and proof of more is error. This Court warned that such error may be prejudicial even if admonitory instructions are given. Thus, the correct test of prejudicial error even in the face of proper instructions was stated by this Court as follows: (p. 764)

> "It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own in the total setting. * * *
>
> "This must take account of what the error meant to them not singled out and standing alone, but in

relation to all else that happened. Any one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record."

Here "the thing done wrong" was permitting the jury to hear the immensely prejudicial testimony relating to the Bonita conspiracy (Pet. Br. pp. 7, 8, 16) in which petitioner concededly was not involved. *Kotteakos* recognizes that while instructions may be designed to keep "separate transactions separate", the error is nevertheless prejudicial where, as here, a defendant is connected with only a few of so many distinct transactions.

Paoli carries *Kotteakos* logically forward. It holds that even in a *one conspiracy case* (where there is no question of variance) admonitory instructions are not enough to protect a defendant from evidence admissible only against a co-conspirator where the case is complicated. Indeed, a most respectable minority of this Court, as pointed out in petitioner's opening brief (pp. 17-19), would extend the rule to cases much less complicated than the one at bar.

It is thus quite apparent that the government's argument as to the protection afforded petitioner by the cautionary instructions is utterly irrelevant, since *Paoli* holds that under these circumstances no instructions can be adequate.

Finally, petitioner's argument that *Kotteakos* demands a "painstaking examination" (p. 771) of the entire trial record is answered by the government only in a footnote (Govt. Br. p. 20) that "obviously" the court below did so. Petitioner respectfully submits that the opinion below,

258 F. 2d 9, 11, indicates that the precise opposite occurred and that the materiality of the variance was determined solely upon the findings that the offenses might have been joined and that the instructions were adequate to protect petitioner.*

II.

TITLE 18, SECTION 3500, IS UNCONSTITUTIONAL. EVEN IF IT WERE CONSTITUTIONAL, THE CARLIN STATEMENT IS STILL DISCOVERABLE TO PETITIONER.

The government contends that the *in camera* examination by the Court below of a statement *de hors* the record was proper. The only justification it advances in support of this is that Title 18, Sec. 3500(c) permits a Court of Appeals to re-examine such statements after they have been considered by the trial court on objections by the government and are part of the record on appeal. (Gov't. Bf. pp. 27, 28).

The mere statement of this argument demonstrates how hard put the government is in defending this absolutely improper practice and makes evident the necessity for the exercise of the supervision of this Court.

Furthermore, the government argues that such *in camera* inspections amount to due process since *Jencks* v. *U. S.* (1957) 353 U. S. 657 promulgated only a rule of evidence. Petitioner disagrees with these contentions and there is thus here raised a question as to whether Title 18, Section 3500 is constitutional at all. This question

---

* A more careful reading of petitioner's brief (p. 12, 13) will show that petitioner has always so contended and the government's statement (footnote p. 20) as to petitioner's arguments is clearly wrong (footnone, Gov't. Bf. p. 20)

is of such prime importance to the administration of criminal law in the Courts of the United States that this Court should here decide it once and for all.

In *Jencks*, this court unanimously decided that a defendant was entitled to the production of statements and reports made to government agents by witnesses when those reports bore upon the subject of their testimony. The only difference between the majority and minority arose out of a difference of opinion as to who should in the first instance examine such reports to determine their relevency—the defense or the trial court. The majority decided in favor of the former, stating p. 668:

> "Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. *Justice requires no less.*" (Emphasis supplied.)

The language of this Court makes clear that it intended by its decision to hold that due process under the Fifth Amendment required such examination. If so, Title 18, Sec. 3500 is unconstitutional since it deprives a defendant of that right. Accordingly, the reliance of the court below on that statute is error and in conflict with *Jencks*.

Petitioner also suggests that Title 18, Sec. 3500 is unconstitutional because it establishes a rule of procedure and is therefore in contravention of Article III of the Constitution vesting power in this Court.*

In addition, the government contends that the Carlin Statement is not within the ambit of Title 18, Sec. 3500. In this connection it is pointed out that the

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* For further development of this suggestion see Vol. VII, No. 2, Catholic University Law Review, p. 91, "Jinks and Jencks", by Arthur John Keefe.

court below held that it was error under *Jencks* to deny petitioner the right of inspection of this document. The seriousness of this admitted error is highlighted by the fact that neither the government in its brief here nor the court below (both of which have examined the statement) make any claim that it does not contain matter relevant to the subject matter of his examination. Nor is any assertion made that the statement is privileged against disclosure on the grounds of national security, its confidential character, public interest or otherwise.

Heretofore, petitioner contended that the Carlin statement is within the compass of Title 18, Sec. 3500. (Ptr's. Bf. pp. 27-29). The government's argument raises the question as to how this is to be determined. It seems evident that a summary of what a witness has said may often include a "substantial verbatim recital." Should not this fact be determined by permitting a full examination of the witness and the person preparing the statement? Does not due process require such procedure? These questions have arisen in the trial courts and are bound to arise again and again in the future. This Court should determine them in the interests of orderly procedure in the Courts of the United States.

The government's reliance on *United States* v. *Palermo* (1958) (2nd Cir.) 258 F. 2d 397, as to what is or is not a statement, is a classic example of lifting by one's own boot straps since that decision is by the same court which is sought to be reviewed here. The best that can be said of it is that the court below is consistent, even if wrong. The *Scales* case also relied upon by the government is completely inapposite since it does not reach the question at all.

Finally, it is pointed out that, unfortunately, the government has not seen fit to respond to petitioner's argument that even if, *arguendo*, the statement were not discoverable under Title 18, Sec. 3500, it is still available under *Jencks* or other rules of discovery and evidence. The reliance in *Jencks* by this Court on *United States* v. *Burr* (C.C. Va.) F. Case No. 14694, p. 187, strengthens this interpretation as does its statement, p. 667:

> "For production purposes, it need only appear that the evidence is relevant, competent and outside of any exclusion rule * * * 344 U. S. at 420."

CONCLUSION.

It is believed that it has been demonstrated that the arguments of the government are unsound and unresponsive and fail to support its position. Further, it is pointed out that the hurried attempted by Congress to overcome this Court's decision in *Jencks* v. *United States* (1957), 353 U. S. 657 by the enactment of Title 18, Section 3500 has resulted in confusion and chaos in the trial courts of the United States. A large number of cases presently pend before this Court because of varied interpretations of it. Is the statute constitutional at all? It is respectfully submitted that these matters are so important as to require a final determination of them by the Court.

Respectfully submitted,

ANTHONY BRADLEY EBEN
Counsel for Petitioner.

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IN THE

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OCTOBER TERM, 1958.

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vs.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals
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BRIEF FOR PETITIONER LEV.

ANTHONY BRADLEY EBEN
135 S. La Salle Street
Chicago 3, Illinois

The Scheffer Press, Inc.—ANdover 3-6850

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OPINION BELOW.

The opinion of the Court of Appeals for the Second Circuit (R. 80-86) is reported in 258 F.2d 9.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 11, 1958 (R. 87). The time for filing a petition for a writ of certiorari was extended by order of this Court on September 9, 1958 to October 10, 1958. The petition was filed on that date and was granted as to questions 5, 6 and 7 of the petition on December 8, 1958. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article III, Section 1 of the United States Constitution provides that:

> "1. The judicial Power of the United States shall be vested in one Supreme Court, * * *"

Amendment V to the United States Constitution provides:

> "No person shall * * * be deprived of life, liberty or property, without due process of law; * * *."

Amendment VI to the Constitution of the United States provides that:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with witnesses against him; * * *"

18 U. S. C., § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U. S. C., § 3500:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States

to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may di-

rect, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

QUESTIONS PRESENTED.[1]

1. Is it proper for a reviewing court to make an examination *in camera* of a sealed summary of a witness's prior statement to a government investigator furnished it by the prosecutor and of *ex parte* affidavits pertaining to the summary in order to determine whether the summary is discoverable under the provisions of 18 U. S. C. § 3500, when no claim is made that it contained irrelevant or extraneous matter?

2. Are not summaries and reports of prior statements made by witnesses to a government investigator available to the defendant under the provisions of 18 U. S. C., § 3500?

3. Does 18 U. S. C. § 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?

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[1] These questions were respectively 5, 6 and 7 in the petition for certiorari.

STATEMENT.

Petitioner was convicted with others by a jury sitting in the United States District Court for the Southern District of New York and sentenced to nine months imprisonment and to pay a fine of $5000 (R. 9, 10).

The conviction as to petitioner was upon the first count of an indictment which charged him and eight others, including one Rubin and one Ades, with conspiring to defraud the United States of its governmental functions of administration and procurement of governmental contracts free from partiality, obstruction, dishonesty and fraud and its right and interest in the conscientious and faithful services of certain employees of the New York Quartermaster Procurement Agency and the Armed Services Textile and Apparel Procurement Agency free from corruption, dishonesty, bias, hope of unlawful reward and fraud in violation of 18 U.S.C. § 371. (R. 12)

As part of the conspiracy it was charged that petitioner Rubin[1] and Ades would offer and give money and other things of value to officers and employees acting on behalf of the Quartermaster Corps for the purpose of inducing them to 1) disclose confidential information prior to awarding of government contracts, 2) corruptly grant deviations in the specifications of government contracts and 3) influence their decisions on matters pending before them. (R. 13, 14)

In support of these allegations the government offered the testimony of one Carlin, an accountant, tending to demonstrate the commencement and form of the conspiracy charged (R. 21-73). Carlin testified to a number

[1] Rubin is a petitioner in this Court in No. 437.

of conversations (R. 27) among Rubin, Ades and one Levy, a partner of Ades but not a defendant, during the course of which Rubin stated that he could obtain government contracts for Levy and Ades because of his connections and intimate acquaintances in the Quartermaster Corps (R. 26, 28, 31, 64) and that about 5% of any contract price would be needed as expenses to take care of these people to return favors that might be extended to him there (R. 30, 55, 64). Carlin also testified that Rubin had stated that these connections would see that he was awarded contracts (R. 28, 31), that he could exercise some control over the selections of inspectors who would be assigned to examine the goods being manufactured (R. 38) and that he could get deviations from contract requirements if needed (R. 38, 39). He also testified to a check drawn by Ades and Levy in the amount of $1000 which Rubin told him was to pay for expenses incurred in the Quartermaster Corps. (R. 32, 33).

During the cross-examination and at its termination, the trial court was asked to direct the government to produce a statement which Carlin stated he believed he had signed, and which he said he had given to Balaban and Poole, Senate investigators, concerning the events to which he testified. (R. 45, 46). The trial court denied these requests on the grounds that no proper foundation showing inconsistency had been laid (R. 46, 74).

Upon appeal of this cause to the Court of Appeals for the Second Circuit petitioner contended that the trial court's ruling in this respect was reversible error. This contention was based on *Jencks* v. *United States*, 353 U.S. 657 (1957), which had been handed down by this Court after the termination of the trial below (R. 85).

The prosecutor at the trial thereupon presented to the court below a sealed envelope which according to two

affidavits accompanying it executed by the prosecutor and Balaban contained a report of an interview with Carlin by Balaban and Poole (R. 75-78). The Court below characterized it as a "summary of an interview" (R. 85). These affidavits were to the effect that the report or summary was the only written record made of Carlin's interview, was written after it occurred and that it summarized generally what Carlin related to Balaban (R. 75-78). No claim was made that it did not relate to the subject matter of Carlin's testimony.

The Court of Appeals after making an *in camera* examination of the contents of the sealed envelope and the two affidavits held that the refusal of the trial court to permit inspection by petitioner of a statement of this nature was error but harmless since it was merely a summary of an interview and therefore not available to petitioner on a new trial under the provisions of 18 U.S.C. § 3500. (R. 85, 86)

SUMMARY OF ARGUMENT.

I.

18 U.S.C. § 3500 does not provide the sole procedure by which all statements and reports made by government witnesses to government agents are discoverable.

That procedure is made applicable only to statements defined in Par. (e) which in turn does not relate to undefined statements and reports referred to in Par. (a) of the Statute. This is made clear from both the express language of the statute and the legislative intent underlying it.

Conceding, *arguendo,* that the statement here involved is not within Par. (e) of 18 U.S.C. § 3500 because it is a general summary of what the witness told the government agent rather than a substantially verbatim recital of what he said, nevertheless it is discoverable under *Jencks* v.

United States, 353 U.S. 657 (1957) and the Federal Rules of Criminal Procedure.

II.

The document here in question purports according to the court below to be a report made by a government agent summarizing generally what was stated to him by a government witness. Petitioner has never seen it.

The words "substantially verbatim recital of an oral statement made by said witness" as used in Par. (e) of 18 U.S.C. § 3500 do not necessarily exclude the report in the case at bar.

The true test is whether or not the agent's report contains the substance of what the witness told him. If it does, it is discoverable under 18 U.S.C. § 3500. This is made clear by judicial decision and the intent of Congress as shown by the legislative history of the Statute.

Further, since the intent of Congress was not to nullify but to clarify the *Jencks* decision and since the report is discoverable under that decision, the report is discoverable under the Statute.

III.

The *in camera* examination of the contents of a sealed envelope containing the government agent's report is not authorized by 18 U.S.C. § 3500 since no claim was made that the report did not relate to the subject matters of the witness's testimony.

Therefore, if the report is within the definition of Par. (e) of the Statute, it would be producible to petitioner in the event of a new trial without an *in camera* examination.

If the report is not within that definition, it is producible to petitioner under *Jencks* v. *United States*, 353 U.S. 657 (1957) without prior inspection *in camera* by the court.

Further, the consideration by the court below of affidavits relating to the report furnished it by the prosecutor *dehors* the record without affording petitioner the right to cross-examine denies him his constitutional rights under the 5th and 6th Amendments.

IV.

In any event, 18 U.S.C. § 3500 is unconstitutional in that it deprives defendants of due process of law. Due process of law requires that statements and reports of government witnesses to government agents be produced to the defense in the first instance because only the defense is adequately equipped to determine their effective use in discrediting witnesses.

The Statute is also unconstitutional because it constitutes an interference by the legislative branch of the government with the rule-making powers of this Court vested in it by Article III of the Constitution.

ARGUMENT.

I.

18 U.S.C. § 3500 DOES NOT PROVIDE THE EXCLUSIVE PROCEDURE BY WHICH ALL STATEMENTS AND REPORTS OF GOVERNMENT WITNESSES TO GOVERNMENT AGENTS ARE DISCOVERABLE. A REPORT SUMMARIZING GENERALLY WHAT A GOVERNMENT WITNESS STATED TO A GOVERNMENT AGENT IS DISCOVERABLE UNDER A DECISION OF THIS COURT AND UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE.

The thrust of the decision below is to prevent discovery or production of any report or memorandum by government agents of interviews with government witnesses unless it falls within the statutory definition of a "statement" contained in 18 U. S. C. § 3500 (e).

Assuming, *arguendo*, that the court below was correct in its view that the Carlin statement was not within such definition, it is submitted, nevertheless, that it is still discoverable. The holding to the contrary contravenes the express language of the statute, violates the intent of Congress in enacting it, and conflicts with this Court's decision in *Jencks* v. *United States*, 353 U. S. 657 (1957) and with the Federal Rules of Criminal Procedure.

A. The Express Language of the Statute.

An examination of 18 U. S. C. § 3500 indicates that it is a hybrid consisting of two distinct and separate portions dealing in the first instance, Par. (a), with statements and reports generally and in the second instance, Par. (b)-(e), with specific types of statements.[1]

[1] For a discussion of the hasty manner in which Congress approached and passed the statute with virtually no hearings and limited debate, see 67 Yale Law Journal 674, 680-685, 7 Catholic University Law Review 91, 93-93.

As to the first portion, Par. (a), the statute provides no definition whatsoever of the statements and reports which are to be made available by subpoena, discovery or inspection. It does provide, however, that the production of such undefined statements and reports is postponed until the government witness has testified.

If the statute terminated at this point it would seem that the holding of *Jencks* was not affected by it. However, it does not there terminate and the second portion of the statute provides procedure by which certain specific statements, those defined in Par. (e), are to be produced.

It is evident that the second portion does not touch the first since the definitions in Par. (e) are made to relate solely to Pars. (b), (c) and (d) and not to Par. (a). This is further demonstrated by the fact that the word "statement" as used in Par. (b) is immediately qualified by the words "as *hereinafter* defined." As heretofore stated the terms "statement or report" set out in Par. (a) are undefined and the term "report" is never again used.

Since the statements and reports referred to in Par. (a) are thus insulated in the above manner from the procedures for discovery as set up by Pars. (b), (c) and (d), it follows that such statements and reports are not subject to the restrictions of those paragraphs. They may therefore be discoverable under other rules of court or procedure.

B. Legislative Intent.

The legislative history of 18 U. S. C. § 3500 also evidences the intent of Congress not to provide in it an exclusive procedure for discovery of all statements and reports of government witnesses.

The original legislation as drafted by the Justice Department and which it sought to have enacted was

presented to both the Senate and House and provided in Par. (a) that:

> "In any criminal prosecution brought by the United States, *any rule of court or procedure to the contrary notwithstanding,* no statement or report of any prospective witness or person other than a defendant which is in the possession of the United States shall be the subject of subpoena, discovery, or inspection, *except as provided in Par. (b)* of this section." 103 Cong. Rec.-Part 8, 19120, 10181. (Emphasis supplied.)

The House passed the bill in this identical form after limited debate. 103 Cong. Rec.-Part 12, 16130. However, the Senate made two changes (insofar as here pertinent) to the Justice Department draft of Par. (a). The first of these changed it to read as follows:

> "(a) In any criminal prosecution brought by the United States, no statement or report of a prospective witness which is in the possession of the United States shall be the subject of subpoena, discovery, or inspection, except as provided in the Federal Rules of Criminal Procedure, or as provided in Par. (b) of this section." 103 Cong. Rec.-Part 8, 10984.

The second changed the paragraph so as to make statements or reports discoverable, "*if* provided in the Federal Rules of Criminal Procedure or as provided in Par. (b) of this section." 103 Cong. Rec.-Part 12, 15799.

The debates indicate that among the reasons for the first change of Par. (a) was the desire of the Senate to make clear that it was not passing a statute which would repeal discovery under the Federal Rules of Criminal Procedure. 103 Cong. Rec.-Part 12, 15787.

The debates also make clear that the second change was based upon the thought that the Senate should not express any view at all as to whether the Federal Rules of Criminal Procedure were applicable to statements of witnesses. 103 Cong. Rec.-Part 12, 15791.

Thereafter the Senate and the House bills went to conference which finally reported out the bill as ultimately enacted. 103 Cong. Rec.-Part 12, 16486, 16737. As so enacted Par. (a) reads as follows:

> "In any criminal prosecution brought by the United States no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) to an agent of the government shall be the subject of subpoena, discovery or inspection until the witness has testified on direct examination in the trial of the case."

It thus appears that all references to "any rule of court or procedure to the contrary notwithstanding" and all restrictions on discovery "except as provided in Par. (b)" were eliminated as was the specific reference to the Federal Rules of Criminal Procedure. These changes make obvious that Congress completely rejected the Justice Department's effort to confine all discovery of statements and reports of witnesses to the procedure established in Par. (b), and liberalized the proposed legislation. This rejection demonstrates the intent of Congress that the statute not foreclose the discovery of those statements and reports beyond the narrow definition of Par. (e).

C. Discoverability of the Carlin Statement.

Since the statute by its express terms as well as by congressional intent does not limit discovery of all statements and reports of witnesses, it is submitted that the Carlin

statement is producible to petitioner in the event of a new trial under the authority of *Jencks* v. *United States*, 353 U. S. 657 (1957).

All of the requirements there laid down are met. Carlin had testified in chief and the statement was shown to relate to that testimony. The document was identified and clearly no fishing expedition is here involved (R. 45, 46). Neither the court below nor the government has ever asserted the contrary and no question of relevancy has ever been raised. The court below, in fact, stated in effect that but for the intervention of 18 U. S. C. § 3500, *Jencks* would require production of the Carlin statement to petitioner (R. 85).

Jencks is not limited to statements as defined in Par. (e). It dealt specifically with reports of witnesses in the possession of the government "written and, when orally made, as recorded by the F. B. I." 353 U. S. at 668. This Court did not indicate that such oral reports must be substantially verbatim and recorded simultaneously or that they could not be in summary.[1]

The underlying logic of the *Jencks* decision makes obvious that the Carlin memorandum is discoverable under it. This Court there held that "relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness." 353 U.S. at 669. This in turn was based upon this Court's recognition, p. 667, that:

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[1] In fact, among the reports it there considered were some notes taken by the F.B.I. from the oral statements of the witness Ford. Sup. Ct. Rec. 164-166, 170, **Jencks v. United States**, No. 23, Oct. Term, 1956.

"Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness's testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

Obviously a summary of a statement to a government agent may have the greatest value in establishing prior inconsistencies. The fact that such a summary might not be admissible in evidence is of no import, since this Court recognized the distinction in testing relevancy for discovery purposes as against relevancy for evidentiary use. 357 U.S. at 669.[1]

Finally, it appears that a number of courts have recognized that statements of witnesses are discoverable under the provisions of the Federal Rules of Criminal Procedure. *Fryer* v. *United States*, 207 F. 2d 134 (C.A. D.C., 1953); *United States* v. *Peace*, 16 F. R. D. 423 (S.D. N.Y., 1954).

II.

A GOVERNMENT AGENT'S SUMMARY OF WHAT A GOVERNMENT WITNESS TOLD HIM IS DISCOVERABLE UNDER 18 U.S.C. § 3500.

As heretofore pointed out, the contents of the sealed envelope subjected to the *in camera* examination of the court

[1] This comports with basic rules. Prior inconsistent statements are frequently shown by the hearer thereof, and there is no necessity that the evidence be in written form. It is the evidence of the court reporter that impeaches one testifying inconsistently to a prior statement made under oath in a recorded judicial proceeding—not the record of that proceeding.

below consisted of a memorandum prepared by a Senate investigator summarizing generally an interview with the witness Carlin (R. 85). Therefore, according to the court below, it was not a "substantially verbatim recital" of his statement. It is respectfully submitted that this is error.

In the first place, the words "substantially verbatim" and "summarizing generally" are not mutually exclusive. The former denotes something less than entirely word-for-word. On the other hand, the latter terms may still contain a large amount of the verbiage of the witness. The problem then remains as to how many words of the witness must be used to make a substantially verbatim recital. No standard is provided by the statute. However, its legislative history and judicial interpretation of the phrase "substantially verbatim" point unerringly to the conclusion that memoranda of the type before this Court fall within the statute.

The congressional intent in the above respect is evidenced by the statement of Senator O'Mahoney, in charge of the bill in the Senate, who stated, when it was being considered in its final form, that it "would include a memorandum made by an agent of the government of an oral statement made to him by a government witness." 103 Cong. Rec.—Part 12, 16488.

Further, the conference report tendered to the House indicated that the bill agreed upon conformed with the standards "enunciated by Judge Moore * * * in *United States* v. *Anderson, et al* * * * set forth at page 14552 of the Daily Congressional Record of August 27, 1947". 103 Cong. Rec.—Part 12, 16737, 16738.

The statement of Judge Moore made prior to the enactment of 18 U.S.C. § 3500 indicates the desirability of making statements available when they contain the *substance* of

the witness' remarks and the undesirability of making them available when they consist only of the *subjective impressions, opinions or conclusions* of the person making such notes or reports. 103 Cong. Rec.—Part 12, 15940.

After 18 U.S.C. § 3500 was enacted the words "substantially verbatim recital" were construed in *United States* v. *Waldman*, 159 F. Supp. 747, (D.C. N.J., 1958). It was there stated, p. 749:

> "Of course, by the 'substantially verbatim recital', 'verbatim' is not meant. It need not be word for word. It need not use exactly the words of [the witness], nor must [the witness] words be used in their exact grammatical phrasing. That would prevent the use of any narrative statement. *What is meant is, that the statement should give the substance of what [the witness] said;* should give it, so far as the *substance* is concerned, substantially in [the witness'] words. A reading of the statement here in question clearly shows that is exactly what the statement does. *It equally clearly shows that the facts there stated are not the mere 'comments' or 'ideas' of the agent.*" (Emphasis supplied.)

There is nothing in the opinion below to indicate that the Carlin memorandum did not contain the substance of his interview with Balaban. In fact, the failure to assert irrelevancy indicates the exact contrary. Further, the court below did not take the position that it contained impressions and conclusions of the person making it.

Finally, as heretofore argued, *Jencks* permits this discovery under the circumstances here. Legislative history pertaining to 18 U.S.C. § 3500 indicates that it was designed not to nullify but to clarify *Jencks*. S. Reps. 569, 981, 85th Cong., 1st Sess. 2 (1957); H. R. Rep. No. 700, 85th Cong., 1st Sess. (1957); 103 Cong. Rec.—Part 12, 15785. If this be the case, the Carlin statement must indeed be discoverable under 18 U.S.C. § 3500.

III.

AN IN CAMERA EXAMINATION OF A SEALED STATEMENT OR REPORT NOT CLAIMED TO BE IRRELEVANT AND RELATED AFFIDAVITS DEHORS THE RECORD IS NOT AUTHORIZED AND DEPRIVES PETITIONER OF HIS CONSTITUTIONAL RIGHTS.

In arriving at its decision the court below utilized procedure which is virtually without precedent in courts of review. No statement or report of Carlin was made part of the authenticated and certified record on appeal. No such statement or report was ever exhibited to the trial court. Nevertheless, the court below considered *in camera* the contents of a sealed envelope furnished it by the prosecutor. Petitioner has never seen this document. **Compounding this peculiar and unorthodox procedure, the court below also considered two affidavits dehors the record also furnished it by the prosecutor** (R. 75-78, 85).

The extraordinary and irregular character of this procedure is ironically highlighted by a recent decision of the court below in *United States* v. *Miller*, 248 F. 2d 163 (1957). In that case the court demonstrated zeal in staying within the confines of the certified record when an excursion outside of it, as the court made here, might well have produced the reversal of a conviction. It refused to examine a witness's statement (also in a sealed envelope) found by the trial court, at a time prior to this Court's decision in *Jencks*, to be not only consistent with, but to contain matters unrelated to the witness's testimony. Holding that the trial court erred in failing to furnish the statement to the accused after excising portions of it, the court below stated (p. 165):

> "* * * but we cannot determine whether or not it was prejudicial error because the exhibit has by stipulation been excluded from the record on appeal. Since we cannot know that failure to deliver the statement, properly excised, was prejudicial to the defendant, we do not think a new trial should be ordered."

The procedure of the court below in the case at bar is improper not only because it ignores time-honored rules for preserving the authenticity and integrity of litigated issues, but also because it violates the very standards of fairness and justice which prompted this Court's decision in *Jencks*.

Jencks, of course, establishes that the determination of whether an earlier statement or report of a government witness is suitable for cross-examination or impeachment should be made by defense counsel and not by the trial judge. Only the defense counsel has sufficient familiarity with his case to make this decision. 18 U.S.C. § 3500 permits an *in camera* examination of certain defined statements by the trial court and then only when a claim is made by the government that it contains matter which does not relate to the subject matter of the testimony of the witness. No such claim is made here; hence, there is no statutory authority for an *in camera* examination by the trial court or the court below. Where, as here, the claim is made, not that the statement contains extraneous matter, but that it is not discoverable at all, the question should be resolved, as are all other matters of discovery, by the trial court openly, with full right to a defendant to make all proper inquiry and argument. *Cf. United States* v. *Waldman*, 159 F. Supp. 747 (D.C. N.J., 1958).

The arrogation to itself by the court below without statutory authority of the right to make such a determination

secretly and upon self-serving affidavits without affording petitioner the right to cross examine deprives him of his rights under both the 5th and 6th Amendments to the Constitution. *Alford* v. *United States*, 282 U.S. 687 (1931); *United States* v. *Douglas*, 155 F.2d 894 (C.A. 7, 1946); *Lindsey* v. *United States*, 133 F.2d 368 (C.A. D.C., 1942).

IV.

18 U.S.C. § 3500 IS UNCONSTITUTIONAL IN THAT IT IS IN CONTRAVENTION OF ARTICLE III AND THE FIFTH AMENDMENT OF THE CONSTITUTION.

Implicit in the questions here raised is the question of whether 18 U.S.C. § 3500 is constitutional at all.[1] If it is not, the lower court's reliance on that statute is unjustified and according to its own concession the Carlin statement would be discoverable under *Jencks*.

As has been seen, 18 U.S.C. § 3500 permits *in camera* examination of the statements defined by it in Par. (e) when the government makes the claim that such statements contain matter which does not relate to the subject matter of the witness' testimony.

Prior to the enactment of the statute, this Court held in *Jencks* v. *United States*, 353 U. S. 657 (1957) that such statements were producible in the first instance to the defense. It reasoned that "Justice requires no less" since "only the defense is adequately equipped to determine the effective use of such statements and reports for the purpose of discrediting the Government's witness * * *" 353 U. S. at 668, 669. Of course, only this Court can determine whether it meant due process by its use of the word "jus-

[1] Constitutional questions are directly raised in related cases assigned for argument immediately hereafter.

tice". If it did, obviously the statute contravenes the Fifth Amendment to the Constitution.

It is submitted that this Court was in fact referring to due process because involved here are a defendant's right to the effective assistance of counsel. The *in camera* examination provisions of the statute effectively deprive him of that right by preventing counsel from arguing relevancy either in the discovery or evidentiary sense. This is true whether the question arises at the trial or appellate level. This constitutional infirmity was recognized in both the Senate and House. 103 Cong. Rec.-Part 12, 15790, 16738.

It further appears that the statute violates the Constitution in still another respect. Under Article III of the Constitution the judicial power has been vested in this Court and quite obviously that power includes the power to make rules of procedure. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816).

Under the principles of separation of power no authority exists for Congress to make such rules and that it has done so in the past cannot create the power where it does not constitutionally exist. Therefore to the extent that 18 U. S. C. § 3500 abrogates, repeals or nullifies the Federal Rules of Criminal Procedure promulgated by this Court the Statute is unconstitutional.[1]

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[1] This argument is enlarged upon by Prof. Arthur John Keefe in 7 Catholic University Law Review 91, 108-112. (1958).

CONCLUSION.

The decision below should be reversed and the case remanded for a new trial.

Respectfully submitted,

ANTHONY BRADLEY EBEN
Counsel for Petitioner

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Nos. 435-436-437

In the Supreme Court of the United States

OCTOBER TERM, 1958

HARRY LEV, PETITIONER

v.

UNITED STATES OF AMERICA

RAYMOND WOOL, PETITIONER

v.

UNITED STATES OF AMERICA

MARVIN RUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
JULIA P. COOPER,
JEROME M. FEIT,
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 435

HARRY LEV, PETITIONER

v.

UNITED STATES OF AMERICA

No. 436

RAYMOND WOOL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 437

MARVIN RUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 80–86) is reported at 258 F. 2d 9.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1958 (R. 87). On September 9, 1958, Mr. Justice Harlan extended the time for filing petitions for writs of certiorari to and including October 10, 1958 (R. 88–89). The petitions were filed on that date. On December 8, 1958, the petitions were granted in all three cases—Nos. 435 and 436 being granted as to limited questions (R. 90–92). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions on which the Court granted certiorari in Nos. 435 and 436 were phrased by petitioners as follows:

No. 435:

1. Is it proper for a reviewing court to make an examination *in camera* of a sealed summary of a witness's prior statement to a government investigator furnished it by the prosecutor and of *ex parte* affidavits pertaining to the summary in order to determine whether the summary is discoverable under the provisions of Title 18 U.S.C., Section 3500, wher no claim is made that it contained irrelevant or extraneous matter?

2. Are not summaries and reports of prior statements made by witnesses to a government investigator available to t' e defendant under the provisions of Title 18 U.S.C., Section 3500?

3. Does Title 18 U.S.C. Section 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?

No. 436:

4. Whether the rights of the petitioner were substantially prejudiced when the trial court denied the motion of the defendants to direct the Government to produce a statement which a witness for the Government had previously given to government agents, in direct violation of this Court's decision in *Jencks* v. *United States,* 353 U.S. 657.

The Government believes that the questions presented by the three cases may be stated as follows:

1. Whether it was within the constitutional power of Congress to provide, as it has in 18 U.S.C. 3500, that investigators' summaries of prior oral statements of witnesses, not signed, adopted or approved by the latter, are not subject to production for impeachment purposes.

2. Whether the Court of Appeals properly examined a document *in camera* in reaching the conclusion that a new trial should not be ordered since the document was not a statement which could be required to be produced under 18 U.S.C. 3500 at a new trial.

3. Whether it was error, under *Jencks* v. *United States,* 353 U.S. 657, for the trial court to deny the request of one defendant for production of what proved to be the summary of a Senate investigator's interview with a witness, where the document had not been seen or approved by the witness and was not then in the possession of the prosecution.

4. Whether it was reversible error to deny the request for production of the Senate investigator's summary where the testimony of the witness was secondary

and largely admitted by the defendant making the request; where the testimony of the same witness before the Senate Committee was available to the defense and was used for impeachment purposes; and where the guilt of all the defendants was proved by overwhelming evidence from other sources.

STATUTE INVOLVED

18 U.S.C., Supp. V, 3500 provides:

> SECTION 3500. *Demands for production of statements and reports of witnesses.*—(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the wit-

ness, the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

Count 1 of a three-count indictment, returned in the United States District Court for the Southern District of New York in March 1956, charged petitioners and six others with a conspiracy, in violation of 18 U.S.C. 371, to defraud the United States with respect to the administration and procurement of government contracts. Counts 2 and 3 charged petitioner Rubin with bribery in connection with the contracts, in violation of 18 U.S.C. 201 (R. 12–16). After a lengthy jury trial, petitioners and two co-defendants, Ades and Hort, were convicted under the conspiracy count.[1] Petitioner Rubin was acquitted of bribery under the second count, but convicted under the third (R. 9, 18–19).

Petitioner Lev was sentenced to serve nine months imprisonment and to pay a fine of $5,000; petitioner

[1] One co-defendant entered a plea of guilty and testified as a prosecution witness; one was acquitted. A motion to sever was granted as to two others.

Wool to eighteen months and a fine of $1,500; and petitioner Rubin to fifteen months each on the first and third counts, to run concurrently, and a $1,000 fine on the first count (R. 10, 17, 19). On appeal by petitioners and co-defendant Ades, the convictions were affirmed (R. 86).

A. THE GOVERNMENT'S EVIDENCE IN GENERAL

The cap contract. In 1952, petitioner Rubin was working for a firm for which he had obtained several Navy contracts in return for 33⅓ percent of the company profits (Tr. 410, 1913–1924).[2] In early 1952, he was contacted by the officers of Bonita Originals, Inc., a New York firm manufacturing dresses in Puerto Rico, which had suffered business losses and was interested in obtaining government contracts (Tr. 300, 373, 3089, 3094–3095). Rubin had many meetings with the officers—Ades, the president (and a co-defendant in the action), Levy, the secretary-treasurer, and Carlin, an accountant who had initially suggested that Rubin could get the government contracts Bonita needed (Tr. 314, 406–407, 3095). Rubin told the officers that he would get all the Army contracts they could handle in return for 50 percent of the profits accruing from the work (Tr. 307, 315, 408, 3097). He said that 5 to 7 percent of the face value of the contracts would be needed

[2] In view of the expense which would be involved in reproducing the entire record, petitioners have printed only those portions of the trial transcript dealing with demands for production of a document. Since the government is making an alternative argument of harmless error, we shall refer to facts appearing in the trial transcript ("Tr.") on file with this Court.

for gifts and entertainment for government personnel in order to get the contracts and to avoid any difficulties with the government in the course of their performance (Tr. 312–313, 412). He spoke specifically of his contacts at the New York Quartermaster Procurement Agency (NYQMPA), later known as the Armed Services Textile and Apparel Procurement Agency (ASTAPA), an agency which handled procurement for all of the armed forces until October 1953 (R. 176, 307). Rubin mentioned the names of "Major Farnell", a contracting officer, and "Mella Hort", a clerk in the contract administration branch of the agency (Tr. 314).

Bonita's officers accepted Rubin's proposal when he agreed to take 33⅓ percent, instead of 50 percent, of the profits (Tr. 309, 3100). After Rubin brought them samples of various Army garments, they decided that the company would bid on three contracts for manufacture of the Army garrison cap, that being a relatively simple item which could be made in the company's subsidiary in Puerto Rico (Tr. 414, 415). Rubin, who was to handle the bidding exclusively (Tr. 416–417, 3197), gave repeated assurances that Bonita would receive the contracts (Tr. 416, 420).

In June 1952, Bonita was awarded all or part of the three contracts, which covered the manufacture of over one million garrison caps (Tr. 417, 3198). The award to Bonita of two of these contracts had been recommended by NYQMPA contracting officer Major Eric Farnell, who had supervisory authority over the issuance, review and evaluation of bids, the making of awards, and the administration of con-

tracts (Tr. 157, 163–164, 179–180). The clerk in charge of the administration of the three contracts, subject to Farnell's supervision, was Mella Hort (Tr. 165–166, 190).

After the award, the company president, Ades, took over the management of the plant in Puerto Rico, where the caps were to be made. Levy, the secretary-treasurer, remained in New York with Rubin, who was to be in complete charge of liaison with the procurement agency (Tr. 357, 416, 358–359, 420, 1074, 3197). Almost immediately, Rubin requested money from Levy in order to reward the government personnel who had aided in securing the contracts (Tr. 318, 422–423). Rubin suggested that Levy record the payments in Arabic and that he charge the sums to travel and entertainment on the company's books (Tr. 433). He told Levy that an initial sum of $1,000 which had been turned over to him had been paid to Major Farnell (Tr. 433). In Levy's presence, he gave a $500 payment to an NYQMPA accountant, Poilack, who had likewise recommended the awards (Tr. 157, 165, 426–427, 431). In September 1952, Rubin gave $100 to Mella Hort, which was entered on company books as a $99.70 charge to travel and entertainment (Tr. 439–440). Contemporaneously, Hort prepared a document authorizing the government's acceptance of 37,000 defective hats manufactured by Bonita at a reduction of one cent per hat (Govt. Ex. 8–D; Tr. 111). Thereafter, numerous payments of sums of money, one as high as $1,500, were made to Major Farnell, Mella

Hort, Pollack, and other procurement agency employees (Tr. 496, 499, 521–530, 538).

Petitioner Wool, an Air Force captain, came to work at the agency in September 1952, succeeding Major Farnell as the contracting officer having authority over the Bonita contracts (Tr. 89). In December 1952, Bonita's secretary-treasurer, Levy, recorded in his Arabic notes that Captain Wool had been given $200, upon Rubin's request, because Wool was going to help them in the future (Tr. 504). In November, Wool and Mella Hort, at Rubin's request, changed the delivery schedules to give Bonita more time to complete its contracts without penalty (Govt. Ex. 3–B; Tr. 106). In February 1953, petitioner Wool, Mella Hort and Major Farnell prepared an authorization accepting some 2,000 defective Bonita-made caps at one cent per hat reduction in price (Govt. Ex. 6–B; Tr. 109).

In addition to payments of money, Rubin, using Bonita funds, plied procurement agency employees with gifts. A deep-freeze, large quantities of meat and lingerie went to Porreca, an agency chief inspector who controlled the assignment of all inspectors (Tr. 460, 510–511, 513, 1205, 1227–1233). Porreca, at Rubin's request, transferred a subordinate assigned to the company's Puerto Rican plant and replaced him with a new plant inspector whom Rubin had suggested (Tr. 444–445, 1213–1226). The new plant inspector lived "like a king," rent free, in Ades' house during his three months' inspection duty and "cooperated" fully, even to the point of sending de-

fective caps to Rubin instead of to his superiors (Tr. 1224, 1351–1356).

Rubin, in New York, purchased clothing for Mella Hort and for her children (Tr. 466–470, 1516–1517, 1522). Both she and Wool visited the Bonita offices frequently (Tr. 471, 552, 1135). On one occasion, Wool picked up an overcoat for himself; another time, children's garments which Ades had sent from Puerto Rico (Tr. 471, 550–552).

In June 1953, Bonita paid Wool's medical bills, amounting to some $265 (Tr. 543–545, 1145–1146). On Rubin's instructions, the Bonita secretary omitted the designation "Dr." before the doctor's name on the check and charged the amount, on the company books, to professional fees (Tr. 546, 1087). Rubin told Levy that Bonita should pay the bill because it needed more work and because Wool was trying to get a contract for Bonita which another firm (R. & J.) was performing (Tr. 543–544).

At about this time, Wool and Hort visited the R. & J. firm, threatening it with cancellation of its government contract unless it met its delivery schedules on garrison caps or subcontracted to another company (Tr. 3366–3377, 3587–3588). The firm was forced to subcontract, and Bonita obtained the subcontract (Tr. 167–168). Mrs. Hort told Levy that she and Wool had "worked hard" to get the subcontract for Bonita (Tr. 570–571).

In the summer of 1953, Bonita received its final payment on the garrison cap contract, after having sent to Puerto Rico, at company expense and compensation, a government property specialist who dis-

covered and ironed out discrepancies in inventory (Tr. 1159–1166).

The white hat contract. In December 1952, and again in April 1953, while Bonita was fulfilling its cap contracts, the procurement agency received requests for the purchase of nearly 7 million enlisted men's white sailor hats, and 7 thousand midshipmen's white hats (Tr. 168). An invitation to bid was issued on April 23, 1953 (Tr. 169). Petitioner Wool was assigned as the contracting officer (Tr. 165–166).

Petitioner Rubin learned of the government purchase authorizations, despite their classified nature, long before the invitation to bid was issued (Tr. 571–572, 2059). He discussed with Levy the possibility of Bonita's submitting a bid, but Levy refused because he felt that Bonita was not equipped to handle the work (Tr. 576, 578).

In early April, some three weeks before the invitation to bid had been issued, petitioner Lev, the owner of the Mid-City Uniform Cap Company in Chicago (R. 580), met with Rubin in the home of Mella Hort. They discussed the possibility of bidding on the white hat contract (Tr. 1523–1524). Rubin described to Lev the advantages of manufacturing in Puerto Rico (Tr. 2077–2078).

Several days later, Rubin and Lev met in an automobile a short distance from ASTAPA (Armed Services Textile and Apparel Procurement Agency) headquarters. Lev signed a check for $2,000, made payable to Mrs. Hort's husband (Tr. 1511–1512, 3412–3414). Although the defense later claimed that this check was given as an advance on an unmaterialized resin enter-

prise (Tr. 1520, 3415), Rubin told Levy that Lev had given the check, as well as clothing from Saks Fifth Avenue and cash of $400 or $500, to Mella Hort in connection with the white hat contract. Levy recorded this in his Arabic notes (Tr. 617–620, 663). Both Lev and Hort, in testimony previously recorded before a Senate Committee, had admitted the gift and receipt of the clothing (Tr. 1518–1520, 1522–1523).

After further meetings between Lev and Rubin in Chicago and in New York, it was decided that they would bid on the white hat procurement (Tr. 2083, 2087, 2092–2094). Lev was to receive 51% of the profits; Rubin and Ades (who flew in from Puerto Rico to attend the New York meeting of Lev and Rubin) were to share the remaining 49% (Tr. 594; Govt. Ex. 67, Tr. 2100). Rubin told Levy that he and Ades would bring their profits into Bonita (Tr. 592, 597). He also told Levy that Wool and Hort were assisting them in getting this contract (Tr. 606).

Ades immediately began negotiations with Puerto Rican authorities for an option on some newly constructed government-owned factory buildings (Tr. 1550–1551). He told the authorities that Lev, his new partner, was in the process of receiving an award from the United States Government for the manufacture of Navy hats. This took place before Lev had submitted a bid. Negotiations for the option were completed on May 1, 1953.

Four days later, on May 5, 1953, which was the last day for submitting bids, the Lev group bid for the entire quantity on an all-or-nothing basis (Tr. 169, 2097). Its offer was the lowest bid (Tr. 2096).

ASTAPA ordered a pre-award survey to be made of the Lev facilities in Puerto Rico to determine whether they were adequate (Tr. 1242). Rubin asked Chief Inspector Porreca to expedite the survey (Tr. 1242). Although the survey report revealed that Lev and the others had absolutely no machinery in the plants and no personnel on hand, the report concluded that the facilities were adequate (Govt. Exs. 14–F, 14–H; Tr. 123). Porreca, reviewing the report, told Rubin there might be certain difficulties because of the lack of machinery (Tr. 1244). Rubin assured him that there would be no difficulties because Raymond Wool was assisting, stating, "Ray is one of the boys. What are you worried about?" (Tr. 1244–1245). On May 20, 1953, on Wool's recommendation, the entire contract was awarded to Lev (Tr. 170).

Shortly thereafter, Wool called the Bonita office and spoke to Rubin (Tr. 607–8). Rubin told Levy that Wool was upset because he had received only $1,000 from Lev and that he was supposed to receive $5,000 (Tr. 608–609). Rubin then called Lev and told him that Wool was complaining (Tr. 609). Lev withdrew $8,000 from his Chicago bank (Tr. 1416) and came to New York on June 29, 1953 (Tr. 1193–1194). He met Rubin, Wool and Mrs. Wool at a restaurant where he handed Mrs. Wool $5,000 in cash (Tr. 610–612). Shortly thereafter, the Wools made a $5,900 cash payment on a home (Tr. 1419–1420).

During the same month, Lev requested permission to modify certain packaging requirements imposed by the contract. Wool granted the permission, saving Lev more than $60,000 (Gov't. Exs. 16–A, 16–K; Tr.

79, 138, 171, 1705–1716). Porreca, who had been given $1,000 by Lev, had another (see *supra*, p. 10) "difficult" inspector reassigned at Rubin's request (Tr. 1250–1254). Lev was delinquent in meeting delivery dates, and a substantial number of the hats were defective (Tr. 1573–1578, 1645–1646, 1618–1650, 1816–1819).

B. THE CARLIN TESTIMONY

The demand at the trial. Among the twenty-seven witnesses called by the government was the accountant, Carlin, who explained that he had worked with Bonita for nine months in 1952 (R. 21, 24-25). He identified company books and records, including the general ledger, and an entry in the ledger by which he had posted a thousand dollar check to "Entertainment" (R. 25–37). He identified the check and said that Rubin told him it was for expenses incurred in the Quartermaster procurement office (R. 32-33). The same check was later identified by Levy, the company secretary-treasurer, who testified that he signed it for Rubin on the latter's representation that he needed it "to give as a present" to the people that helped him on the contract (Tr. 422).

Carlin also described the meetings which he attended in April and June 1952 with the company officers, Ades and Levy, when they sought Rubin's help (see *supra*, p. 7). Specifically, he testified, as did Levy (in more detail), Ades and, to some extent, Rubin, as to Rubin's assurances that he could secure government contracts (R. 26, 28, 31); Rubin's demands for compensation (R. 27); Rubin's purported government contacts (R. 26, 30, 38); and indications from Rubin

that he would need money to return favors extended to him (R. 30). Carlin further alluded to Rubin's subsequent aid in such matters as supplying the company with samples (R. 31) and securing an extension of delivery dates (R. 39).

At the end of Carlin's direct testimony, counsel for petitioner Lev elicited from the witness that, during his nine-month association with Bonita, he had nothing to do with Lev; that Lev's name was not mentioned in any way; and that Lev had nothing whatever to do with the transactions which the witness had described (R. 39–40, 41).

Counsel for petitioner Rubin, after general inquiries directed mainly at establishing the origin of Carlin's association with Bonita, asked, "Mr. Carlin, when is the first time that you gave a statement to any Government agency concerning the events that you testified to here this morning?" Over the government's objection based on lack of foundation, the witness was permitted to answer (R. 45). Carlin said that he recalled the circumstances, but not the time nor the name of the agency. He said that he later learned that the two gentlemen who came to his office were "the first contacts I had was [with] what was later to be hearings held in Washington," and that they appeared approximately six months before these hearings (R. 45–46). Counsel suggested, and Carlin agreed, that the men were Senate investigators (R. 45), and that their names were Poole and Balaban (R. 46). Carlin said he gave them a statement; he said he believed he signed it (R. 46). Counsel then requested production of the statement. The court

sustained the government's objection that no sufficient foundation had been laid for production. It ruled further that no foundation had been laid for counsel's request that it (the court) look at the statement to see if there were inconsistencies (R. 46).

Thereafter, the witness, in answer to a query by Rubin's counsel, stated that, so far as he could remember, he had told Poole and Balaban nothing different from what he had testified at the trial (R. 46), and that, if they had asked him whether he had himself posted the thousand dollar entry under "Entertainment," he must have surely said that he did, since the entry was made in his handwriting (R. 48–49).

Counsel for petitioner Wool had no questions for this witness (R. 64).

Excerpts from Carlin's testimony at a hearing before the Senate Committee were then read by counsel for another defendant (Hort) in cross-examination and by government counsel on redirect. The excerpts described the representations made by Rubin as to his contacts at the procurement office and his alleged ability to secure contracts (R. 66–73).

The court, in a colloquy with Rubin's counsel outside the presence of the jury, reaffirmed its ruling with respect to what Carlin told investigators Balaban and Poole, saying in part (R. 74):

> * * * You must at least indicate to me something that makes it appear that there might have been something inconsistent in that statement. Then I would read it over. But there wasn't the slightest indication. As matter of fact, everything you brought out indicated that it was consistent. The mere request doesn't

> make it necessary for me to look at it. Otherwise the Court would be busy all day long looking at every possible document that had anticipated the case. * * *

The record before the Court of Appeals. On appeal, the Assistant United States Attorney who had prosecuted the case in March and April 1957 filed with the Court of Appeals his sworn affidavit (R. 75-76). He stated that, at the time of the demand for the alleged signed statement of the witness Carlin to the two Senate investigators (Balaban and Poole), he had no such statement or report of an interview in his possession, and that he had no knowledge of the existence of either. He further stated that, following this Court's decision in *Jencks* v. *United States*, 353 U.S. 657, in June 1957, he sought the aid of the Senate Permanent Subcommittee on Investigations,[3] and that a search of that Committee's file revealed no statement signed by Carlin, but merely a copy of a memorandum prepared on March 17, 1955, by investigators Balaban and Poole after an interview with Carlin. The prosecutor's affidavit recited that this memorandum, reporting the interview, had been signed and dated by Balaban and was attached in a sealed envelope. Also attached was an affidavit executed by Balaban.

Balaban's affidavit recited that, in the course of his investigation of fraudulent textile procurement practices in the military services, he and Poole interviewed Carlin; that this was the only interview; and

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[3] A Subcommittee of the Senate Committee on Government Operations.

that no signed statement was obtained from Carlin. The affidavit recited that, following the interview, Balaban prepared a memorandum for Chief Counsel Kennedy (of the Senate Subcommittee), in which he summarized generally what Carlin had related; that the memorandum, prepared on March 17, 1955, was the only memorandum known to be in the Subcommittee files; and that it was neither adopted nor approved by Carlin, nor was it a substantially verbatim recital of an oral statement made by Carlin.

Attached also was a letter from the Acting Chief Counsel of the Senate Committee, addressed to the prosecutor, verifying that a check of Subcommittee files disclosed no record of any interrogation or interview concerning Carlin other than that reflected in the Balaban memorandum.

SUMMARY OF ARGUMENT

During the trial of this case, which occurred before the decision of this Court in *Jencks* v. *United States*, 353 U.S. 657, a secondary government witness, who had testified before a Senate Committee, stated on cross-examination that he had talked with a Committee investigator some time before his public testimony, and thought that he had signed a statement for the investigator. A request for the statement, by counsel for one of the three petitioners, was refused on the ground that there was no showing of inconsistency. When this case came on appeal, after *Jencks*, the prosecutor submitted to the Court of Appeals an affidavit stating that he had not known of the existence of any such document at the time of

the trial; that thereafter he had learned from the Senate Committee that the only document they had was, not a statement by the witness, but the investigator's summary of his interview with the witness. The investigator submitted an affidavit to the effect that the report was made after the interview and was a summary, not a substantially verbatim account of what the witness had said. The summary was submitted under seal to the Court of Appeals. The Court of Appeals held that there was no occasion to reverse the conviction since the document was not a statement which would now be subject to production under the "Jencks" Act, 18 U.S.C. 3500.

The government's position is that the summary would clearly not now be subject to production under 18 U.S.C. 3500; that the Congressional determination that production of such a document is not required is constitutionally valid; that *Jencks* did not require production of this type of paper; and that, apart from the statute, non-production of the summary, even if error, was clearly harmless in the circumstances of this case.

I

By the "Jencks" Act, 18 U.S.C. 3500, Congress excluded investigative summaries of prior oral statements from production for purposes of impeachment of a witness. The judgment that this was a desirable procedure was within the constitutional power of Congress.

A. The definition in 18 U.S.C. 3500(e), *supra*, p. 6, of the kind of document which must be produced on demand, after a witness has testified, clearly excludes

from its coverage a summary of an interview with a witness unless the statement has been seen and adopted by the witness. The only documents which the witness has not seen and approved, made subject to production, are stenographic or mechanical recordings, or the equivalent thereof, *i.e.*, "a substantially verbatim recital" of an oral statement "recorded contemporaneously." The legislative history makes clear that it was the deliberate congressional judgment that it would not be wise to permit a witness to be impeached on the basis of a statement, not signed or adopted by him, which represents an investigator's hearsay summary of what the witness has said. The only reports which Congress thought a proper basis for impeachment are reports directly attributable to the witness so that it would be unnecessary to decide what part of the report reflects the mind of the witness and what the mind of the investigator. In short, the theory behind the legislation is that a witness should be impeached only on the basis of a statement which is truly and wholly his.

B. Congress was acting within its acknowledged sphere of power when it defined the kind of statements which must be produced for impeachment of the witness and those which should not be produced for that purpose. The authority of Congress to prescribe rules of evidence for use in the inferior federal courts has long been recognized. If the Congressional judgment as to kind of statements which ought to be produced is a rational one, founded in reason and experience, the statute is not subject to attack on constitutional grounds.

In Anglo-American jurisprudence, extra-judicial statements have long been regarded as suspect, and as a result of the hearsay rule, they are admissible only in exceptional circumstances which tend to provide strong assurance of reliability. An investigator's summary of what a witness has said is of course hearsay. The Congressional judgment that such hearsay does not have sufficient earmarks of reliability to warrant production, far from being irrational or unusual, is in the main stream of the common law. See *Palmer* v. *Hoffman,* 318 U.S. 109; *New York Life Insurance Co.* v. *Taylor,* 147 F. 2d 297 (C.A.D.C.); *Communist Party* v. *Subversive Activities Control Board,* 254 F. 2d 314, 325 (C.A.D.C.).

In *Jencks,* this Court pointed out that the value of statements of a witness for purposes of impeachment is not limited to flat contradiction; that the "omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment," are also relevant. Precisely because these subtle variations are significant, it is important that the statement be that of the witness and not that of the investigator. The omission of facts, the contrast in emphasis, and the difference in order of treatment could all stem as easily from the investigator as from the witness. A summary by an investigator, particularly one written some time after the interview, must always to some degree represent the joint product of the minds of the witness and of the investigator. For this reason, a summary by an investigator does not begin to have any reliable impeaching value until it can be determined what de-

tail and what emphasis is attributable to the witness and what to the investigator.

Any attempt to settle the question of how much of a summary is attributable to the witness and how much to the investigator could transform a trial on the issue of guilt into a trial on the collateral issue of authorship of the statement. The deliberate Congressional decision requiring production only of statements truly attributable to the witness protects against the danger that the trial will degenerate into a battle on such collateral issues. The Congressional distinction is founded on the same general considerations of policy which underlie judicially-developed limitations upon cross-examination and impeachment which have as their objective the reduction of trial confusion. Traditionally, cross-examination and impeachment are not allowed to become a device for sidetracking and delaying the trial on issues collateral to the main cause.

II

A. The Court of Appeals had the right to consider the affidavits of the prosecutor and the investigator, as well as the Senate investigator's summary of his interview with the witness, in deciding whether it should reverse the judgment on that ground. The function of the appellate court was to determine whether the conviction should be set aside because of substantial error at the trial. If the claimed error as to production of the document was discovered to rest on an *assumption* of fact (*i.e.*, that the report was the witness' own) which turned out, plainly and clearly, not to be the fact, there would be no occasion to reverse.

The Court of Appeals therefore could properly consider whether a controversy as to the facts relating to the document did actually exist, just as it could consider external facts to determine whether a cause is moot or whether a suit is collusive.

B. As more fully developed in the government's brief in *Rosenberg*, No. 451, a court may look at documents *in camera* to decide whether they are the kind of papers which are subject to production. If Congress has the right to define the documents which are properly to be subject to production, as we have argued in Point I, *supra*, it is appropriate for the court to sort out the documents which Congress has said should be produced from those which Congress has said should not be produced. The defense is entitled to see only those which are to be produced, not the others. Here, the Court of Appeals had the solemn and sworn assurance of the prosecutor and the investigator as to the nature of the document, and also had the document before it. It therefore could properly decide that the document was not one which would be subject to production under 18 U.S.C. 3500.

C. Consideration by the Court of Appeals of the document did not violate the principle against *ex post facto* legislation, whether or not it would have been subject to production under *Jencks* v. *United States*, 353 U.S. 657. A change in the rules of evidence permitting the admission of documentary evidence excludable at the time of the offense has been held not so fundamental as to be inapplicable under *ex post facto* principles. *Thompson* v. *Missouri*, 171 U.S. 380. A statute which alters rights only as to

the kind of document subject to inspection, and which at best might possibly be useful for impeachment, represents a less substantial change. *Hopt* v. *Utah*, 110 U.S. 574, 590.

III

The premise of petitioner's entire argument is that non-production of the document here in issue would have been error under the decision in *Jencks*—a question which the Court of Appeals did not reach. We submit that this assumption is erroneous. *Jencks* was different in several significant ways.

In *Jencks*, the two Government witnesses (Ford and Matusow) were crucial and were paid to make reports to the Government; here, the witness (Carlin) was secondary and not a paid informant. In *Jencks*, the witnesses' reports were contemporaneous with the events; here, the Senate investigator's interview with Carlin took place three years after the events. In *Jencks*, the statements were indisputably the witnesses' own; here, the report was that of an investigator. In *Jencks*, the prior statements furnished the main means of testing the witnesses's credibility at the trial; here, Carlin had previously testified at an open Senate hearing (following his interview with the Senate investigators) and the transcript of that sworn testimony was fully available to the defense and was used at the trial. Finally, unlike *Jencks*, the prosecution here did not have the investigator's summary in its possession at the trial and did not know of its existence.

IV

A. Even if non-production of the document was error, it was harmless in this case. Only petitioner Rubin moved for production of the report of Carlin's interview with the Senate investigator. The failure of the other petitioners to do so is quite understandable for Carlin's testimony had no bearing on the case against them. His testimony, aside from identifying Bonita company records, related to the initial formation of the "cap" aspect of the conspiracy (*supra*, pp. 15–16), in which petitioner Lev was not involved at all, and into which petitioner Wool entered at a late stage.

Carlin's testimony was not even significant as to Rubin. Most of the facts testified to by Carlin were admitted by Rubin himself when he took the stand. Beyond that, Carlin testified to posting a $1,000 check to "entertainment." It was witness Levy, however, who testified that Rubin said this check was needed to reward government personnel, and suggested that such payments be charged to travel and entertainment expenses. Evidence by Carlin as to this one entry was certainly insignificant in view of the testimony of Levy, described as "devastating" by the court below, the testimony of former government personnel (some of whom had succumbed to bribery), and the admissions by Rubin himself. Carlin's entire testimony could have been dispensed with, without denting the government's overwhelming proof.

B. *Jencks* has not been (by the lower courts) and should not be interpreted as holding that never, under any circumstances, may the failure to produce a prior

statement as to any witness, no matter how inconsequential, be deemed non-prejudicial. Harmless error by its very nature is a problem to be resolved on the particular facts of each particular case. In the light of all the evidence in this case, and the opportunity to test Carlin's testimony in other ways, the failure to order production of a summary of a Senate investigator's interview with this secondary witness does not justify reversal of this conviction.

C. Petitioners attempt to give special significance to the ruling on Carlin's testimony by asserting that, since Carlin was an early witness, the ruling must be assumed to have influenced their later conduct at the trial in not asking for other statements. The record shows, however, that counsel exhibited no such reluctance as to objections to the admissibility of evidence, and there is no reason to believe that this early ruling caused them to refrain from taking other action at the trial with regard to other witnesses. This case was being tried in the Second Circuit which had what was considered, at the time, an advanced rule as to production of statements and reports. The trial judge, in ruling on Rubin's demand for production as to Carlin, said that he would look at a document if there were "something that tends to make us believe that there was something inconsistent" in it. To say that this ruling intimidated or deterred counsel from attempting to obtain other statements is an attempt to find some basis for asserting prejudice where none in fact exists.

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ARGUMENT

Introduction

The document involved in this case, which is on file with this Court, is a Senate investigator's summary of what witness Carlin had told the investigator concerning events which occurred more than three years before the interview. The summary was not written by the witness, but was made by the investigator some time after the interview. In a sworn affidavit, the investigator describes it as a memorandum in which he "summarized generally what Carlin had related." The memorandum was not seen, adopted or approved by the witness. It was not used by the prosecution before or at the trial and was neither seen nor used by the witness. After making the statement to the investigator, the witness testified before the Senate Committee at an open hearing. This sworn testimony at the hearing was not only available but was actually used as a basis for cross-examination at the trial. The specific issues which this case presents are whether, under these circumstances, the failure to turn over to the defense the Senate investigator's summary was error, and, if so, whether it was the kind of error which requires a new trial.

The Court of Appeals, which had the document before it,[4] held that even if, under the decision of this Court in *Jencks* v. *United States,* 353 U.S. 657, the document should have been produced—an issue

[4] As noted *supra*, p. 18, the prosecutor did not have the document in his possession at the time of trial. He filed a copy with the Court of Appeals, together with the affidavit of the investigator stating how the document was prepared.

which the court did not decide—there was nevertheless no reason to reverse the conviction since now, under the so-called "Jencks" Act (18 U.S.C. 3500), production would not be required. Petitioners challenge this holding in various respects. As to 18 U.S.C. 3500, they argue that the Court of Appeals erred in making for itself the determination whether the document was a "statement" under 18 U.S.C. 3500; and that, if the statute precludes the production of an investigator's summary of a witness's out-of-court statement, it is unconstitutional. Beyond this, they argue that, since their trial was held before enactment of 18 U.S.C. 3500, their conviction should be reversed regardless of the application of the statute to any future trial.

Since this is the first of a series of cases in which the Court is considering the application and constitutionality of various provisions of 18 U.S.C. 3500, we shall discuss, at the outset, the problems arising under that statute as it applies to this case. We urge that it was the judgment of Congress, expressed in the statute, that an investigator's summary of an oral report of a witness is not a proper basis for impeachment of the witness; that this Congressional judgment is a reasonable one, founded in logic and experience; and that the statute is accordingly free from constitutional objection on this ground.[5] We

[5] There is further discussion of the "Jencks" Act in the Government's briefs in No. 451, *Rosenberg* v. *United States*, at pp. 30–62, and in No. 488, *Scales* v. *United States*, at pp. 99–108. The argument in our brief in No. 471, *Palermo* v. *United States*, pp. 17–21, mainly rests on the argument in the present case. The discussion in our brief in Nos. 489, 491,

also show that it was entirely proper for the Court of Appeals to consider whether the statement was one as to which production could be required under the statute.

Finally, we shall examine the case apart from 18 U.S.C. 3500. We shall argue that, under the rule of the *Jencks* case, production was not required, and that, even if it was, the error, viewed in the context of this case, cannot be deemed prejudicial.

I. By 18 U.S.C. 3500, Congress excluded summaries of prior oral statements from production for purposes of impeachment of a witness. The judgment that this was desirable procedure was within the constitutional power of the Congress

A. The purpose of Congress in enacting 18 U.S.C. 3500 was to permit a witness to be impeached by his own statements, but not by memoranda of other persons purporting to summarize what the witness said

1. *The statutory language*

18 U.S.C. 3500 prohibits discovery of any statement or report until after the witness has testified. See the Brief for the United States in *Rosenberg* v. *United States*, No. 451, at pp. 30–42. Thereafter, on motion of the defendant, the court is to order the production of any statement, as defined in the legislation, relating to the subject matter of the testimony of the witness. "Statement" is defined as follows:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

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Pittsburgh Plate Glass Co. v. *United States* and *Galax Mirror Co.* v. *United States*, pp. 16, 34–35, is confined to the bearing of the "Jencks" Act on the production of grand jury testimony.

> (2) a stenographic, mechanical, electrical, or other *recording,* or a transcription thereof, which is a *substantially verbatim* recital of an oral statement made by said witness to an agent of the Government and *recorded contemporaneously* with the making of such oral statement. [Emphasis added.]

The manifest purpose is to permit impeachment by the witness' *own* prior statement. The statement, even though it is phrased in the investigator's words, is treated as the written statement of the witness if he has in fact approved and adopted it. A statement is also deemed to be the witness' own statement if it is a stenographic, mechanical, electrical or other recording (or transcription thereof), provided that it is a substantially verbatim recordation contemporaneously made.

But a summary of what the witness has said, made by a person other than the witness, some time after the interview, and never adopted by the witness, necessarily falls outside the definition. Such a summary is not the statement of the witness himself. To some degree, never precisely ascertainable, such a summary inevitably reflects the judgment and emphasis of the person making the summary. As we show below, it was the considered congressional judgment that such a summary does not constitute an adequate basis for impeachment of a witness at the trial.

2. The background and general purpose of 18 U.S.C. 3500

18 U.S.C. 3500 followed upon the decision of this Court in *Jencks* v. *United States,* 353 U.S. 657, and,

even more, the uncertainty, reflected in decisions of the lower federal courts, as to its proper application.

The Jencks decision. In *Jencks,* this Court reversed the conviction of a labor union official who had been charged with filing a false non-Communist affidavit with the National Labor Relations Board. The ground of reversal was that the trial court had erroneously denied Jencks' motions for the production of Government reports. At the trial, the Government had relied heavily upon the testimony of two Communist Party members, Ford and Matusow, who had become paid undercover agents for the F.B.I. They testified at length, on direct examination, as to events and conversation which associated Jencks with the Communist Party. Upon cross-examination, they testified that these events and occurrences were described in oral and written reports which they made to the F.B.I. They could not remember which of their reports were oral and which were written. Thereupon, counsel for Jencks, with a view to impeachment, moved the court for an order requiring the Government to produce, for inspection by the court, the reports relating to certain specified events and conversations as to which the witnesses had testified. The trial court denied the motions on the ground that no preliminary foundation, suggesting inconsistency, had been laid; the Court of Appeals affirmed on the same ground. In reversing, this Court noted the crucial nature of the testimony of Ford and Matusow, and the apparent value of the requested reports to impeach that testimony. It held:

(1) The defense was entitled to an order directing the Government "to produce for inspection all reports

of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial." 353 U.S. at 668.

(2) The Court reaffirmed the requirement of laying a foundation, referring to *Gordon* v. *United States,* 344 U.S. 414, at 419, in which it was said that "[t]he demand was for production of * * * *specific documents and did not propose any broad or blind fishing expedition* * * * on the chance that something impeaching might turn up." 353 U.S. at 666–667. It concluded that a sufficient foundation had been established by the testimony of the two witnesses that their reports concerned the very events and activities related in their trial testimony.

(3) Because only the defense was adequately equipped to determine the effective use of such reports to discredit a Government witness, it was entitled to see them initially. The Court disapproved the practice of submitting Government documents to the trial judge for a determination of relevancy and materiality, without hearing the defendant, stating (353 U.S. at 669): "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness."

(4) A criminal action must be dismissed when the Government, on the ground or privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports of Government witnesses touching the subject matter of their testimony at trial.

The Court, in *Jencks*, was dealing with reports by crucial Government witnesses, paid to make such reports, who recorded the events to which their testimony related immediately after those events occurred. Thus, the Court stated that the witness Ford had said that "his reports were made immediately following each meeting, while the events were still fresh in his memory" (353 U.S. at 665), and, further, as to both Matusow and Ford, that they were paid by the FBI "contemporaneously to make oral or written reports" (353 U.S. at 659). The Court obviously considered the reports, whether written or oral, as being the statements of the witnesses or the equivalent. It had no occasion in that case to consider the differences between reports which are essentially the witness' own reports and reports which represent merely a later summary of an investigator's impressions of what the witness has said.

Moreover, the Court's holding in *Jencks* that defense counsel was entitled to determine the usefulness of the documents was made in a case where there was no dispute as to their relevancy. The documents clearly related to the witnesses' testimony. The decision represented disapproval of the then prevailing rule established in the Second Circuit that, even where there were written statements of a witness which clearly related to his testimony at the trial, the trial court would first look at the document to see whether there was such a discrepancy between it and the testimony of the witness at the trial that the

documents could be said to have impeaching value. See the Court's citation in fn. 14, 353 U.S. at 669; cf. *United States* v. *Krulewitch,* 145 F. 2d 76, 92 (C.A. 2); *United States* v. *Ebeling,* 146 F. 2d 254, 256 (C.A. 2); *United States* v. *Beekman,* 155 F. 2d 580, 584 (C.A. 2); *United States* v. *Grayson,* 166 F. 2d 863, 869 (C.A. 2). The Court had no occasion to consider what procedure should be followed where the Government claimed that it had no statement by the witness which could be said to be his, or where it claimed that a statement by the witness had no bearing at all on his testimony at the trial.[6]

Lower courts' decisions after Jencks. These and other questions which this Court had no occasion to consider in *Jencks* did soon come before the lower federal courts. The reach of the *Jencks* decision became a subject of confusion and of conflicting rulings. Thus, some courts held that the trial court still had the right to determine in the first instance whether the Government did have a statement of the witness relating to his testimony at the trial; others that the trial court was not supposed to determine any question of relevancy and that the Government was required in the first instance to turn over its complete file on the case to the defendant. Ignoring both the factual situation in *Jencks* and the repeated emphasis in the *Jencks* opinion that the reports, in order to be subject to production, must be shown to relate to the testi-

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[6] The latter problem is discussed more extensively in the Brief for the United States in *Rosenberg* v. *United States,* No. 451, this Term, at pp. 42–62.

mony of the witness (353 U.S. at 668, 669), some district courts lifted the Court's language out of context and ordered complete files and reports of law enforcement agencies turned over to defendants, summarily dismissing the actions when the Government failed to comply. Thus, in *United States* v. *Alvin Clark*, a narcotics case in the Western District of Pennsylvania, the trial court ordered the production of the entire Narcotics Bureau report and after non-production summarily dismissed. In *United States* v. *Ida A. Stanley*, a wagering tax act case in the Northern District of Georgia, the court ordered the production of the entire intelligence report, although the one Government witness who had testified, a supervisor, had stated that he had not prepared the actual report and that his function was only to review. When the Government resisted production of the entire report, since the witness had testified only to his part in the raid and arrest, the court dismissed.

Some courts held that the only statements of the witness which had to be produced under *Jencks* were contemporaneous ones; others that all documents of any kind which originated from some oral statement of the witness—whether in the words of the witness or the words of the summarizer—had to be produced. In *United States* v. *George Allen Leonard*, a narcotics case in the Northern District of Georgia, the United States Attorney assured the court that there were no written statements by the witnesses who had testified. He declined to produce the investigator's entire report, including summaries of oral statements of the witnesses neither read nor adopted by them. The court

dismissed.[1] Compare *United States* v. *Anderson*, 154 F. Supp. 374 (E.D. Mo.), where Chief Judge George H. Moore, setting up a standard of production based on *Jencks*, observed:

> Category (b) [an established statement made by the witness] includes only continuous, narrative statements made by the witness recorded verbatim, or nearly so, by persons acting for the United States, and does not include notes made during the course of an investigation (or reports compiled therefrom) which contain the subjective impressions, opinions or conclusions of the person or persons making such notes.

There was also disagreement as to *when* production was required. Although the issue in *Jencks* was the test of credibility of the witness at trial, some courts interpreted *Jencks* to authorize pre-trial production of statements and reports. *United States* v. *Ernest Hall*, 153 F. Supp. 661 (W.D. Ky.); cf. *United States* v. *Anderson*, *supra*.

These conflicts were not easily subject to judicial resolution. If the Government declined to comply with a court order, believing it to go beyond *Jencks*, the result was the dismissal of the prosecution, without any right of the Government to appeal. If the Government complied with an order, even if it felt it was too broad, there was no issue for appellate review. It was that situation, as the legislative history shows, which gave rise to the legislation which became 18 U.S.C. 3500.

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[1] The unreported cases cited in this paragraph were collected in a brief printed as part of the record in the Senate debates on S. 2377, 103 Cong. Rec. 15938.

General legislative history. Posing these problems, and pointing out that there was immediate need for legislation to set definite guide lines for the trial courts to follow in applying the principles of the *Jencks* case, Attorney General Brownell spoke, in hearings had before the Senate Subcommittee on Improvements in the Federal Criminal Code of the Committee on the Judiciary, on behalf of the passage of S. 2377, legislation which he said would establish the following procedures (S. Rept. No. 569, 85th Cong., 1st Sess., pp. 4–8):

> 1. Provide that only reports or statements which related to the subject matter as to which the witness had testified would be subject to production.
>
> 2. Give the court the power to excise from any such statement or report matter which did not relate to the subject matter of the testimony of the witness who made it.
>
> 3. Make it clear that the Government need produce only reports or statements of a witness which were signed by him or otherwise adopted or approved by him as correct.
>
> 4. Provide that statements and reports to be used for impeachment of a Government witness were not subject to production until the witness had testified.
>
> 5. Provide that if the Government declined to produce such a statement or report, the court should either strike the testimony affected or order a mistrial.

The statement of the Senate Committee accompanying the proposed legislation pointed out that it was not designed to nullify or limit the principle

that a defendant on trial in a criminal case is entitled to authenticated reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at the trial. The Committee declared (S. Rept. 569, 85th Cong., 1st Sess., p. 2):

> The purpose of the proposed legislation is to establish a procedural device that will provide such a defendant with *authenticated statements and reports* of Government witnesses which relate *directly* upon his [their] testimony. [Emphasis added.]

This purpose of the legislation to set up a *modus operandi* is stressed repeatedly in the legislative history. See also S. Rept. No. 981, 85th Cong., 1st Sess., p. 3; H. Rept. No. 700, 85th Cong., 1st Sess., p. 2. In a brief submitted by Senator O'Mahoney as part of the record, the objectives of the Senate bill are stated as twofold: (1) to clarify the principle of the opinion in *Jencks* and (2) to provide for the orderly implementation of that principle by establishing a set procedure to regularize the demand for, and production of, statements and reports of witnesses in Government files. 103 Cong. Rec. 15939.

In other words, the purpose of the Department of Justice in supporting the legislation, and the purpose of Congress in enacting it, was not to overrule the basic holding of *Jencks*, but to clarify what the basic holding was understood to be, and to regulate the procedural problems which followed in the wake of that holding.

For present purposes, the most important aspect of the statute is the provision defining the kind of statement to which defendants may have access.

3. The legislative purpose in excluding summaries neither signed nor adopted by the witness

The legislative history makes clear, as does the language of the statute itself, that it was the congressional judgment that it would not be wise to permit a witness to be impeached on the basis of an investigator's summary of an interview with a witness, unless the witness had adopted or approved it.

In hearings before a Senate subcommittee of the Committee on the Judiciary, on June 28, 1957, Attorney General Brownell, on behalf of S. 2377, noted that the most serious law enforcement problem had arisen because of the insistence by some courts that *Jencks* required that entire reports of federal investigative agencies be turned over to the defense—including, among many other things, investigative materials such as reports of interviews with possible witnesses or other persons supplying "raw" and unverified personal information. He continued, in part (S. Rept. 569, 85th Cong., 1st Sess., p. 7):

> The second problem arises from the fact that in the *Jencks* case the Court ordered the Government to produce reports orally made by the witness. This raises a grave problem, and the general language of the opinion must be given a reasonable interpretation to prevent serious unfairness. The Department takes the position that unless the witness has been in some way informed of the statements attributed to him, and has indicated his approval of

> their accuracy, that such reports should not be turned over to the defense. Such reports are mere hearsay as far as the witness is concerned and cannot and should not be used to attack the credibility of a witness. Obviously the credibility of a witness cannot be impeached by using a statement that the witness has never seen and never approved and which was prepared by someone else.

The legislation, as introduced in the Senate on July 1, 1957, provided for the disclosure (initially to the court *in camera*) of only such reports or statements of the witness "as are signed by the witness, or otherwise adopted or approved by him as correct * * *" (S. Rept. 569, 85th Cong., 1st Sess., p. 10). As a result of further study by the subcommittee, this language was amended to provide for the production of "any written statements previously made by the witness * * * which are signed * * * or otherwise adopted or approved by him, and any transcriptions or recordings of oral statements made by the witness to a Federal law officer * * *" (S. Rept. 981, 85th Cong., 1st Sess., p. 1). As offered for consideration in the Senate on August 23, 1957, the bill provided, in this same language, for the production of written statements. As to oral statements, however, it read: "[A]ny transcriptions or *records* of oral statements made by the witness to an agent of the Government * * *" (Emphasis added; 103 Cong. Rec. 15787).

The Department of Justice expressed strong opposition to this use of the word "records," which had been substituted for the word "recordings" appearing in the earlier version of the statute. In a letter to

Senator Eastland of the Judiciary Committee, dated August 22, 1957, Acting Attorney General Rogers pointed out that the word "records" might be construed to include reports and files generally, and to "authorize the very rummaging through Government investigative files that the legislation is intended to prevent." He added that, in the context in which the language was used and in view of the positions taken by some Senators, the use of "records" might be taken to include the Government's internal working papers, including memoranda, notes, files, and even grand jury testimony. This, he said, would inevitably reveal investigative techniques, confidential information, and identity of informants and complainants (103 Cong. Rec. 15791).

Senator Dirksen, on August 26th, offered an amendment to reinstate the word "recordings" in place of the word "records." In support of the proposed amendment, Senator Hruska stated (103 Cong. Rec. 15931):

> * * * If the language remains as it is in the bill, many documents for which the witness himself is not responsible will be available for the purpose of impeaching the witness.
>
> I should like to give several illustrations of that. The investigative files, which almost invariably include material of a confidential nature, would be included in the definition of the word "records". That would reach the *summary reports* to which I have referred, which represent not the words of a witness whom it is sought to impeach, but, instead, the words of some third person's understanding of what the witness said. [Emphasis added.]

Senator O'Mahoney, sponsor of the legislation, argued that the requested change was of trivial importance and that the fears of the Acting Attorney General were exaggerated. In answer to a query, he said that an agent's notation from memory as to what a witness had said, neither seen nor approved by the witness, would in any event be inadmissible as hearsay (103 Cong. Rec. 15932). He argued that the word "records" was adequately limited in the context used (*i.e.*, "records of oral statements made by the witness to an agent of the Government") (103 Cong. Rec. 15934). The amendment to substitute the word "recordings" for "records" was defeated (103 Cong. Rec. 15935), and, despite the observation of Senator Dirksen that the bill's phraseology was compounding confusion, it passed the Senate (103 Cong. Rec. 15938).

The following day, August 27th, Mr. Rogers addressed a letter to Congressman (now Senator) Keating of the House of Representatives giving the Justice Department's views on S. 2377, as passed by the Senate. He noted that the Senate version would require the production of statements never signed, adopted or approved by a witness and that the word "records", in the Senate version, would be broad enough to include internal working papers, Government counsel's memoranda, notes and files of investigative agents, and even grand jury testimony. He expressed the view of the Department of Justice that the pending House version of the bill (H.R. 7915) was a far more accurate statement of the procedure

contemplated by the *Jencks* decision than the Senate version (103 Cong. Rec. 16119).

This House version, introduced on July 5, 1957, provided for the production (for inspection *in camera,* initially) of only such reports or statements of the witness "as are signed by the witness, or otherwise adopted or approved by him as correct * * *." The accompanying report (H. Rept. No. 700, 85th Cong., 1st Sess.) pointed out (pp. 5–6):

> The bill makes it clear that the Government need produce only the reports by the witness or statements by the witness which the Government has in its possession which are signed by him or otherwise adopted or approved by him as correct (subsec. (b)). It further provides that such statements and reports are to be used for impeachment purposes only and then only of Government witnesses and are not subject to production until the witness has been called and has testified for the Government (subsec. (b)). Unless a witness has adopted or otherwise approved reports made to the Government, it is not to be turned over to the defense (subsec. (b)). Such material, insofar as the witness is concerned, is hearsay evidence and should not be used to attack his credibility when he is being cross-examined.
>
> * * * * *
>
> * * * Without this provision the general language of the Jencks case could be interpreted as requiring the production of summaries of oral statements made by witnesses to a law-enforcement agent which the witness had never seen or in any way approved. Unless the witness has been in some way informed of the statements attributed to him and has indicated his

approval of their accuracy, the summaries should not be turned over to the defense. * * *

* * * * *

It has always been, and will remain, the practice of the F.B.I. and every other Federal law enforcement agency to take written statements of important witnesses. * * *

Where it is impossible to obtain the signature of the witness to his statement, or where because the matter is relatively unimportant a signed statement was not originally requested, it is the practice in many cases to obtain the approval or adoption by the witness of the summary which has been made of his interview. Whenever this is done, the fact of such approval or adoption is made a matter of record and it is this type of statement, in addition to signed statements, which would be subject to production under the bill.

Where, however, it has been impossible to obtain any verification from the witness that a summary of an interview is correct, it is quite clear that such an unverified and unauthenticated summary could not be used legitimately for impeachment purposes.

On the floor of the House, Congressman Yates asked if this House version would permit examination of only a written report. Congressman Keating replied that, in his opinion and in the opinion of the Attorney General, the *Jencks* case held only that the Government would have to produce statements which had been identified and approved in some formal way by the witness, either signed by him, initialed by him, or taken down in a question-and-answer form and then approved by him (103 Cong. Rec. 16119).

H.R. 7915 passed the House in this form (103 Cong. Rec. 16130), and the bill went to conference (103 Cong. Rec. 16131, 16084).

The bill emerged from conference and was agreed upon by both houses of Congress (103 Cong. Rec. 16489, 16742) with the language of the present provision, which defines the type of statement subject to disclosure (H. Rept. No. 1271, 85th Cong., 1st Sess., p. 2). Although Congress substantially adopted the Senate bill, it used the word "recording" instead of "record," thus indicating its intention not to require production of agents' summaries. The conference bill made specific the type of recordings contemplated:

> [A] stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

"Substantially verbatim" is coupled with "recorded contemporaneously," making explicit the congressional intent that there should be used for impeachment purposes only those summaries of oral reports which can fairly be regarded as the witness' own words.

The House conference report also makes this clear (H. Rept. 1271, 85th Cong., 1st Sess.):

> Another difference discussed by the conferees concerned the provisions of the Senate bill, which extended the types of statements covered by the bill to include "transcriptions or records of oral statements" made by the witness to an

> agent of the Government. To remove any doubt as to the kinds of statements affected by the bill as agreed to by the conferees, a new paragraph "e" was added to the proposed section 3500 of title 18 of the United States Code expressly defining the term "statement".
>
> It is believed that the provisions of the bill as agreed to by the conferees are in line with the standard enunciated by Judge George H. Moore of the eastern district of Missouri in a Finding of Fact and Conclusion of Law filed June 18, 1957, in *U.S.* v. *Anderson et al.*, which is set forth at page 14552 of the daily Congressional Record of August 26, 1957.

The *Anderson* case to which the House report referred is that discussed at page 37, *supra,* where Judge Moore interpreted *Jencks* as applying only to "continuous, narrative statements made by the witness recorded verbatim, or nearly so," and not to reports or notes made during an interview which contain subjective conclusions or impressions of the investigator.

In the Senate, Senator O'Mahoney explained that this language was devised to clear up the doubts of the Justice Department as to the "latitude for the examination of irrelevant reports of agents" (103 Cong. Rec. 16487). Senator Dirksen said that the revised text had the concurrence of the Justice Department (103 Cong. Rec. 16489). Senator Javits, with the agreement of Senator O'Mahoney, observed (103 Cong. Rec. 16488):

> As a practical matter, then, what has been done with the so-called records provision is to tie it down to those cases in which the agent actually purports to make a substantially ver-

> batim recital of an oral statement that the witness has made to him—*not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him, and as transcribed by him* * * *. [Emphasis added.]

In the House, Representative Keating explained (103 Cong. Rec. 16739):

> * * * The conferees provided that the only statements a defendant could see, and then only in the courtroom were those actually signed or formally approved by the witness or a stenographic verbatim recital of a statement made by a witness which is recorded contemporaneously with the making of such oral statement. In other words, *only those statements need be produced in court by the Government which could be shown in court to impeach the credibility of the witness.* [Emphasis added.]

Congress, then, was unmistakably of the view that non-verbatim summaries by an investigator are not to be treated as the statements of the witness, and that a witness should not be impeached by a statement which is not his own, unless he adopts or approves it. The only summaries of oral interviews which Congress was willing to accept were summaries which could be equated to an electrical transcription, *i.e.*, summaries which were both "substantially verbatim" and "recorded contemporaneously." The report had to be such that there could be no question but that the statement was directly attributable to the witness.

This legislative history is a complete refutation of the argument made by the petitioner in No. 435 (Pet. Br. 10–15) that a document, though not within the

definition of "statement" in paragraph (e), might somehow be deemed subject to discovery by virtue of the broad reference to reports in subsection (a). Senate Report No. 981 on S. 2377 stated (p. 2): "The purpose of the proposed legislation is * * * to provide the *exclusive* procedure for handling demands for the production of statements and reports of witnesses" (emphasis added). The purpose of subsection (a), as we develop in the brief for the Government in the case of *Rosenberg* v. *United States,* No. 451, pp. 30–42, was to make certain that no statement or report made by a Government witness to an agent of the Government, whether or not ultimately subject to discovery, was to be inspected prior to trial; and that production even of a written statement or electrical recording should not take place until after the witness had testified at the trial. In thus making clear that there was to be no production *before* trial, Congress certainly did not enlarge its definition of what was to be subject to production *at the trial.*

B. The congressional judgment that a witness should not be impeached by a statement which is not his own is a rational one, consistent with the requirements of due process

Congress was acting within its acknowledged sphere of power when it defined the kind of statements which must be produced for impeachment of the witness and those which should not be produced for that purpose.

The authority of Congress to prescribe rules of evidence and procedure for use in the inferior federal courts (which are themselves established by Congress under the authority of Article 3, Section 1 of the Constitution) has long been recognized. *Wayman* v. *Southard,* 10 Wheat. 1, 22; *Tot* v. *United States,* 319 U.S. 463, 467, and cases cited; *Lutwak* v. *United*

States, 344 U.S. 604, 613–615; Rule 26, Federal Rules of Criminal Procedure. While this Court can, and frequently does, prescribe rules of evidence governing the lower federal courts (Rule 26, Federal Rules of Criminal Procedure; 18 U.S.C. 3771), once Congress has entered the field its determination of court procedure is controlling in the absence of a constitutional question.

This Court said in *Gordon* v. *United States,* 344 U.S. 414, 418:

> *In the absence of specific legislation,* questions of this nature are governed "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [Emphasis added.]

See, also, *Hawkins* v. *United States,* 358 U.S. 74, 78, where the Court noted that it would be appropriate for Congress to reconsider the rules governing the competency of a wife to testify against her husband.

In short, if the Congressional judgment as to the kind of statements which ought to be produced for purposes of impeachment is a rational one, founded in reason and experience, the statute is not subject to attack on constitutional grounds.

1. The statutory distinction between summaries prepared by an investigator, unverified by the witness, and the witness' own extra-judicial statements has a rational basis in experience

We have already indicated (*supra,* pp. 38–48) the doubts which Congress had as to the reliability, for impeachment purposes, of investigative summaries of statements made by potential witnesses. There is solid foundation for this doubt. In Anglo-American jurisprudence, extra-judicial statements have been regarded as suspect for centuries and, as a result of

the hearsay rule, they are admissible only in exceptional circumstances which tend to provide strong assurance of reliability, *e.g.*, where the out-of-court statement is a dying declaration, an admission against interest, or a routine entry made in the regular course of business. So far as the reports of investigators are concerned, it must be stressed that we are dealing not with what a witness said out of court but with what an investigator *said* he said. We submit that memoranda prepared by a hearer, not purporting to be a substantially verbatim recording or to be approved by the witness, could properly be treated by Congress as not having sufficient earmarks of reliability to warrant a requirement of production. Such a congressional judgment, far from being unusual or irrational, is in the mainstream of the common law.

It may be suggested that it is an investigator's business to make reports to his superiors and that this strengthens the credibility of the report. But, certainly a report which is a narrative account or summary of an oral interview, even though made in the course of business or profession, would never have been deemed admissible at common law as coming within the "shop book" or "business record" exceptions to the hearsay rule.

In *Palmer* v. *Hoffman,* 318 U.S. 109, a negligence suit arising out of a train wreck, this Court had occasion to consider the admissibility of a statement made by the locomotive engineer, two days after the accident, in the presence of railroad officials and a representative of the Massachusetts Public Utilities Commission. The engineer was unavailable as a witness at the trial, having died before its commence-

ment. The question was whether his report of what had occurred might be admitted into evidence under the Federal Business Records Act, 28 U.S.C. (1946 ed.) 695, which substantially liberalized the common law "shop book" rule.[5]

In holding that the report was inadmissible, Mr. Justice Douglas, speaking for a unanimous Court, stated (p. 113) that it was not "typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls." Such reports, he continued, are "unlike payrolls, accounts receivable, accounts payable, bills of lading and the like" (p. 114). If admitted, he concluded, the "probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule. * * * We cannot so completely empty the words of the Act of their historic meaning" (pp. 113–114).

Another landmark case arising under the Federal

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[5] 28 U.S.C. (1946 ed.) 695 read as follows:

"In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind."

Business Records Act is *New York Life Insurance Co.* v. *Taylor,* 147 F. 2d 297 (C.A.D.C.), a case of particular interest because it involved memoranda prepared by a disinterested listener (a doctor) on the basis of oral interviews with a patient. The suit was one for recovery under a double-indemnity clause of a life insurance policy, and the issue was whether the insured had died as a result of an accident or had committed suicide. While a hospital patient, he had been killed by a fall down a stair well which was protected by a railing. The fall occurred at night and there were no witnesses to the event. One of the errors claimed by the defendant insurer in its appeal from a judgment of double indemnity was the exclusion by the trial court of various hospital records. These included a report of consultation with the hospital psychiatrist, attributing to the insured statements that he wished to die. Holding the various records inadmissible, the court stated (p. 300):

> In this case the records are not offered to prove routine facts such as the date of admission to the hospital, the names of the attending physicians, etc. They are offered to prove *the truth of accounts of events* and of complicated medical and psychiatric diagnoses. The accuracy of such accounts is affected by bias, judgment, and memory; they are not the routine product of an efficient clerical system. There is here lacking any internal check on the reliability of the records in this respect, such as that provided for "payrolls, accounts receivable, accounts payable, bills of lading and the like." [Emphasis added.]

It observed further (p. 306):

> * * * it is not the absence of a motive to misrepresent which is the basis of the Shop Book exception to the hearsay rule. Purely clerical entries come within the rule regardless of the fact that the party making them has an interest in what they may be used to prove. Conversely where the accuracy of the entries depends on opinion, conjecture or judgment in selecting the particular entries from a larger mass of data which some other observer might consider equally relevant, the entries are not within the Rule regardless of motive.

Even more closely in point is *Communist Party of the United States* v. *Subversive Activities Control Board*, 254 F. 2d 314, 325 (C.A.D.C.), where the court said:

> * * * Is the Party entitled to production, for impeachment purposes, of written accounts made by a third party? Would Budenz be impeached if it were shown that a third party—not presented—had written that he (Budenz) had said so-and-so? We think he would not. Such reports would not be admissible unless the author was put on the stand and subjected to cross-examination. This is a classic situation requiring application of the hearsay rule. The reports, if there are any, are statements made by an unidentified third person purporting to show what a witness had said or done. The hearsay rule applies to writings. * * *

See, also, *Papworth* v. *United States*, 256 F. 2d 125, 129–130 (C.A. 5), certiorari denied, 358 U.S. 854; *United States* v. *Palermo*, 258 F. 2d 397, 399 (C.A. 2), No. 471, this Term, pending on writ of certiorari; *United States* v. *Grunewald*, 162 F. Supp.

621, 624–625 (S.D.N.Y.) ("obviously, a witness cannot be impeached unless the prior statement is his statement"); *United States* v. *Anderson*, 154 F. Supp. 374, 375 (E.D. Mo.) (*supra*, p. 37) (construing the *Jencks* decision as prohibiting the production of reports containing "the subjective impressions, opinions or conclusions of the [recorder]"); cf. *United States* v. *Benson*, 20 F.R.D. 602, 604–605 (S.D.N.Y.).

It might be argued that the courts could have adopted a more liberal rule in the above cases. Indeed, there is respectable authority in the jurisprudence of other countries for the view that hearsay should not be excluded at all. But the problem here is not one of evaluating the advantages and disadvantages of the variant rules which the courts might evolve in the absence of legislation. The question is whether the statute enacted by Congress violates due process, whether Congress' solution of the problem is so irrational and arbitrary that it is constitutionally forbidden. We fail to see how it can be reasonably contended that Congress exceeded its constitutional powers when it said that there is no right to obtain, for purposes of impeachment, material which the courts of England and America have traditionally treated as unreliable hearsay.[9]

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[9] Even where the document was not a work product and was not inherently unreliable, there was no common law right enabling the accused to obtain documents from the prosecution. See the discussion in *Gordon* v. *United States*, 344 U.S. 414, 418.

2. *The distinction finds support in the Jencks decision itself.*

As noted earlier (*supra,* pp. 32, 34), the reports involved in *Jencks* were treated by the Court as constituting statements fully and directly attributable to the witness himself—as either his own written statements or their equivalent. Thus, the Court declared (353 U.S. at 667):

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Precisely because the subtle variations to which the Court referred are considered a basis for impeachment, it becomes important that the statement be that of the witness and not that of the investigator. The omission of the facts related at the trial, the contrast in emphasis, the difference in order of treatment—these are all variations that could as easily stem from the investigator as from the witness. A summary by an investigator can reasonably be expected to highlight and pinpoint that information which the investigator deems of importance at that particular moment in the course of the investigation. He may relegate to secondary position or omit entirely in-

formation which he then thinks irrelevant or unimportant, but which may become significant later, perhaps in another context. The report may also contain personal views and impressions of the recorder. Even when these are not explicit, the recorder's prior knowledge of the witness and of the investigation in progress may be consciously or unconsciously reflected in his summary of the interview. Any delay between interview and recording necessarily injects another substantial element of doubt. This Court has recognized the "grave dangers of inaccuracy and untrustworthiness" of a non-contemporaneous account of a witness's oral statement. *Hickman* v. *Taylor,* 329 U.S. 495, 513. In short, a summary by an investigator, particularly one written some time after the interview, must always to some degree represent the joint product of the minds of the witness and of the investigator.

For this reason, a summary by an investigator does not even begin to have reliable impeaching value, particularly in relation to the nuances of which this Court spoke in *Jencks,* until it can be determined what detail and what emphasis is attributable to the witness and what to the investigator. The aim of impeachment, through the use of prior self-contradictory statements, is to place the prior statement of the witness against his present trial testimony so that the jury may "perceive that both cannot be correct * * * [and] therefore [conclude that the witness] shows a capacity to err." III *Wigmore, Evidence* (3d ed. 1940), Sections 1017, 1018. To show this, particularly on the basis of subtle or selective varia-

tions, the statement should be fully, directly and reliably attributable to the witness. At the least, Congress could rationally reach that conclusion.

3. To permit production of summaries would create difficult trial problems in relation to matters collateral to the main issues of the case and make for confusion and delay

As argued immediately above (*supra*, pp. 56–58), an investigator's summary of a witness's oral statement does not begin to have reliable value for impeachment purposes until it can be shown what is attributable to the witness and what to the investigator. But any attempt to settle such issues could transform a trial on the issue of guilt into a trial on the issue of authorship of the statement. The Congressional distinction, requiring production only of statements truly attributable to the witness, protects against the danger that the trial will degenerate into a battle on such collateral issues.

What would occur if investigators' notes, reports, summaries and work papers were made subject to inspection by the accused? The trial judge would be immediately faced with the enormously difficult task of attempting to separate that portion which seems on the face of the document attributable to the witness from that which represents the subjective impressions of the recorder. Unless the recorder specifically noted the exact points at which he inserted his own impressions, surely no stranger to the interview could pinpoint them with certainty, particularly where they consist of subtle variations in tone and emphasis, and not purposeful interpretations or alterations. But suppose that the trial judge somehow essayed a deter-

mination as to what portions of the report could be deemed a pure reflection of the witness's words. If the witness then denied that the expurgated version of the summary represented what he originally told the agent, should he nonetheless be bound by it? Would counsel be allowed to challenge the witness's disavowal by intensive time-consuming cross-examination? Would he be permitted to offer the recorder's testimony in an effort to resolve the issue? And if that procedure were allowed, would it follow that the recorder's memory as to what the witness told him, some time in the past, would be more trustworthy than the witness's recollection?

The end result would be a collateral and complicating trial of the witness, one subjecting him to the kind of harassment, annoyance, and confusion which it is the duty of the trial judge to avoid, *Alford* v. *United States*, 282 U.S. 687, 694. Such a "trial" would lack the concomitant benefits that may be derived from an intensive examination on the crucial issues in a case. Congress certainly did not act irrationally when it sought to avoid the kind of collateral by-play condemned by Mr. Justice Jackson in *Hickman* v. *Taylor*, 329 U.S. 495, 517 (concurring opinion), where he observed:

> Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the witness would differ from the "exact" statement the lawyer

> had delivered, the lawyer's statement would be whipped out to impeach the witness. Counsel producing his adversary's "inexact" statement could lose nothing by saying, "Here is a contradiction, gentlemen of the jury. I do not know whether it is my adversary or his witness who is not telling the truth, but one is not." Of course, if this practice were adopted, that scene would be repeated over and over again. * * *

The Congressional limitation therefore is grounded upon a valid policy consideration—the same general consideration of policy which underlies various judicially developed limitations upon cross-examination and impeachment: reduction of trial complexity and confusion. To illustrate, a witness called to attest to the good character of the defendant or of another witness is permitted to testify only in general terms as to general reputation for truth and veracity. Such opinion-hearsay is permitted, rather than direct testimony as to specific traits of character, because the latter type of investigation, though assuredly relevant, "would complicate and confuse the trial, distract the minds of jurymen and befog the chief issues in the litigation." *Michelson* v. *United States*, 335 U.S. 469, 478. It is also settled that an inquiring party is bound by a witness's answer when the inquiry relates to a matter collateral to the issues in litigation. Despite the nature of the witness's response, no extrinsic evidence or additional witnesses may be called. This is true where a witness is questioned concerning specific acts of misconduct not amounting to a conviction for a felony, or where he is questioned con-

cerning an alleged prior contradiction material to his testimony, but collateral to the case. See, *e.g.*, *Ewing* v. *United States*, 135 F. 2d 633 (C.A.D.C.), certiorari denied, 318 U.S. 776; *United States* v. *Sager*, 49 F. 2d 725, 730 (C.A. 2); *Pullman Co.* v. *Hall*, 55 F. 2d 139, 141 (C.A. 4); *Simon* v. *United States*, 123 F. 2d 80, 85 (C.A. 4), certiorari denied, 314 U.S. 694; *Coulston* v. *United States*, 51 F. 2d 178 (C.A. 10). The rationale sustaining these limitations is that cross-examination and impeachment must not be allowed to become the means for sidetracking and delaying the trial on issues collateral to the main cause. Certainly, Congress could rationally proceed on the same premise.

II. The Court of Appeals properly considered the nature of the document in determining whether it should reverse and order a new trial

Petitioners argue broadly that the Court of Appeals could not go outside the certified record in order to determine whether the Carlin report was subject to discovery under 18 U.S.C. 3500. They contend further that they were deprived of their rights because the determination was made *in camera*. Petitioner in No. 437 also argues that 18 U.S.C. 3500 should not have been considered in determining whether there was reversible error, because the trial antedated the statute.

A. Petitioners' broad challenge disregards the function of the appellate court, which is to decide whether a conviction should be set aside because of substantial error at a trial. This was a case in which the jury found defendants guilty on the basis of overwhelming

evidence. To be sure, any serious defect in procedure might nonetheless require a new trial. But if the claimed error in procedure was found to rest on an *assumption* of fact (*i.e.*, that the statement was the witness' own) which was indisputably erroneous, there would be no occasion for reversal and for a second protracted trial. The Court of Appeals had the power to consider whether the claimed controversy did in fact exist and, to that end, the right to examine the Carlin report. The procedure followed derives from the same rationale which permits an appellate court to go outside the record on appeal in order to determine whether a controversy is moot or whether a justiciable issue is before it. This Court has recognized the validity of that practice on numerous occasions. See, *e.g.*, *American Book Company* v. *Kansas*, 193 U.S. 49, 52; *Kimball* v. *Kimball*, 174 U.S. 158, 162; *Mills* v. *Green*, 159 U.S. 651, 653; *Doremus* v. *Board of Education*, 342 U.S. 429, 431. Similarly, an appellate tribunal may consider material outside the record which establishes that an apparent controversy is in reality no case or controversy because the suit is a collusive one. *United States* v. *Johnson*, 319 U.S. 302, 305. In short, the court may consider matters outside the record to determine whether a controversy does in fact exist.[10]

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[10] *United States* v. *Miller*, 248 F. 2d 163 (C.A. 2), certiorari denied, 355 U.S. 905, relied upon by petitioner in No. 155, is inapposite. In that case, after an *in camera* inspection of the witness's statement, the trial judge found that it did not relate to his trial testimony and that there was nothing inconsistent between it and such testimony. The parties stipulated to exclude the statement from the record on appeal. The Second

B. Petitioners argue that, at the least, they should have had a *voir dire* hearing to determine how and when the document was prepared.[7]

To decide what procedures were appropriate requires, at the threshold, a consideration of the statutory standard governing production. In our view, the statutory definition of the term "statement" is so explicit and its application to this case so clear that there was no occasion whatever for the Court of Appeals to conduct an adversary proceeding in order to determine whether the Carlin report was subject to discovery.

To be subject to production, the statement had to be an actual recording by stenographic, electrical or equivalent method. It not only had to be "substantially verbatim"; it also had to be "recorded contemporaneously." The words "substantially verbatim" take care of the situation where an inter-

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Circuit held that it was bound by the stipulation and could not independently examine the statement. On this view, it could not determine whether the trial judge's failure to follow the procedures thereafter prescribed in 18 U.S.C. 3500(c) (procedures for determining which portions of statement should be excised and which turned over) had prejudiced the defendant. Such a ruling is far removed from the instant problem. Here the court, not bound by any stipulation of parties, went outside the record for the sole purpose of determining the real fact—*i.e.*, whether the Carlin report was a statement of the witness within the reach of the statute.

[7] A similar contention is made by petitioner Rosenberg in No. 451. In that case, the trial court inspected documents in order to determine whether they were statements relating to the subject matter of the witness's testimony. Constitutional objections to the court's making such a preliminary determination are discussed in our brief in the *Rosenberg* case, pp. 12-62.

viewer writes in longhand what the witness is saying. Such a transcription may be less than perfect—almost invariably, it would involve some slight curtailment or modification of the oral phrasing. But, as we view it, the statute cannot be stretched to cover an investigative summary or a narrative report prepared subsequent to the interview. See, also, the discussion of the legislative history, pp. 38–48, *supra*. Such a report is neither substantially verbatim nor contemporaneous. Its preparation necessarily depends upon the recollection and interpretations of the interviewer.[12]

Did the Court of Appeals have an adequate basis for concluding that the Carlin report was such a summary or a narrative account, and not a substantially verbatim transcription contemporaneously made? The court had the statement of the prosecutor that he did not have in his possession a transcript of any statement by the witness. It had the affidavit of the Senate investigator who interviewed the witness, stating how the report had been prepared. Finally, it had the plain internal evidence provided by the report itself. In these circumstances, we submit, the court could certainly make the determination that the document would not be one subject to discovery at a new trial.

It is, of course, a customary function of courts to make preliminary determinations as to the production of documents and the admission of evidence. As we argue in our brief in *Rosenberg*, No. 451, pp. 42–62,

[12] To the extent that the decision in *United States* v. *Waldman*, 159 F. Supp. 747 (D.N.J.), assumes that such a report might come within the statute, we believe it untenable.

in which this problem is treated more extensively, it was proper for Congress to provide, as it has in 18 U.S.C. 3500(c), that the trial court may examine documents *in camera* to determine whether they relate to the subject matter of the witness's testimony, and no less proper for the court to determine whether a document is of a kind which Congress has made subject to a motion for discovery. One cannot reasonably attribute to Congress a purpose to allow the defendant to see initially that which Congress has plainly provided he shall not see at all.

C. Petitioner in No. 437 argues (Pet. Br. 39–43) that, since the offense was committed and the trial conducted before the enactment of 18 U.S.C. 3500, consideration of the impact of that statute in determining whether the failure to produce was reversible error violates the constitutional prohibition of *ex post facto* legislation. This contention has been consistently rejected by the lower federal courts. *United States* v. *Papworth*, 156 F. Supp. 842, 851–852 (N.D. Tex.), affirmed, 256 F. 2d 125 (C.A. 5), certiorari denied, 358 U.S. 854; *United States* v. *Miller*, 248 F. 2d 163, 165 (C.A. 2), certiorari denied, 355 U.S. 905; *United States* v. *Gandia*, 255 F. 2d 454 (C.A. 2); *Lohman* v. *United States*, 251 F. 2d 951 (C.A. 6); *Bergman* v. *United States*, 253 F. 2d 933, 935 (C.A. 6); *United States* v. *Angelet*, 255 F. 2d 383, 384 (C.A. 2).

As we have already suggested (*supra*, pp. 32–35), and as we argue at greater length below (*infra*, pp. 68–70), we believe that the failure to require production of Carlin's report was not error under the decision in *Jencks* v. *United States*, 353 U.S. 657. But even assuming

otherwise, the Court of Appeals did not err in taking cognizance of the law as it existed at the time of its decision.

As this Court observed in *Beazell* v. *Ohio*, 269 U.S. 167, 170, a case holding that a statute authorizing joint trials for jointly indicated persons was not *ex post facto* as applied to prior crimes: "[T]here may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition" [but it is] "now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited."

The kind of substantial change affecting basic rights which comes within the constitutional prohibition is illustrated by *Kring* v. *Missouri*, 107 U.S. 221, where a Missouri statute which permitted conviction for a greater offense (first degree murder), despite reversal of a conviction on a lesser offense (2nd degree murder), was held invalid as applied to a crime committed at a time when conviction of second-degree murder was held to be an acquittal on the charge of murder in the first degree. As later observed by the Court in *Thompson* v. *Missouri*, 171 U.S. 380, 383, 384, the statute held invalid in *Kring* "* * * was not simply a change in procedure, but such an alteration of the previous law as took from the accused, after conviction of murder in the second degree, that pro-

tection against punishment for murder in the first degree which was given him at the time of the commission of the offence. The right to such protection was deemed a substantial one—indeed, it constituted a complete *defence* against the charge of murder in the first degree—that could not be taken from the accused by subsequent legislation."

On the other hand, a statute which enlarged the class of persons who could be witnesses at a trial to include those previously convicted of a felony (*Hopt* v. *Utah*, 110 U.S. 574, 581) and one which permitted the admission of documentary evidence excludable at the time of the offense (*Thompson* v. *Missouri*, 171 U.S. 380, 382) were upheld against the *ex post facto* challenge. This result was reached in the *Hopt* case despite the fact that the testimony of the felon "tended to implicate the defendant in the crime charged against him" (110 U.S. at 587).[13]

Here, the court has held merely that the statute would bar petitioners' *inspection* of a Government work product, sought for possible use on cross-examination conducted with a view to impeachment. The petitioners are not deprived of a defense and the consequence is neither harsh nor arbitrary.[14]

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[13] See, also, *Gibson* v. *Mississippi*, 162 U.S. 565, 589 (change in qualifications for grand and petit jurors); *Duncan* v. *Missouri*, 152 U.S. 377, 382 (change in organization of State Supreme Court); *Mallett* v. *North Carolina*, 181 U.S. 589, 593–597 (enlarging State's right of appeal).

[14] A comparable issue of *ex post facto* application of the "Jencks" Act is discussed in the Brief for the United States in *Scales* v. *United States*, No. 488, at pp. 110–112.

III. Denial of the request for production would not have been error under *Jencks* v. *United States*, 353 U.S. 657

Petitioners' entire argument is based on the premise that the failure to turn over the Senate investigator's report of his interview with Carlin would have been error under the decision in *Jencks* v. *United States*, 353 U.S. 657, if it were not for the intervening enactment of the statute. As we have already indicated (*supra*, pp. 32–35), we think this is an unwarranted assumption.

The *Jencks* case did not purport to decide that all out-of-court statements made by, or somehow connected with, a prosecution witness, and all accounts or versions of such statements, are discoverable at the instance of the defendant. Like any other decision, *Jencks* must be examined against the background of its salient facts. One must then ask how the facts in *Jencks* compare in significant respects with the facts of the present case.

First. In *Jencks*, the Court was dealing with statements made by two Government witnesses who were crucial to the case and who had been paid to make reports.

Here, as we point out *infra* (pp. 70 *ff*), the witness Carlin was not a principal figure in the trial. Moreover, he was not a paid informant but an ordinary employee of one of the companies involved in the alleged illegal practices.

Second. In *Jencks*, the extra-judicial statements of the two witnesses were closely contemporaneous with the events recounted therein. In ruling that the statements should be made available, the Court stressed

"the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory" (353 U.S. at 667). Indeed, the actual holding of the case is limited to statements contemporaneous with the events described.

Here, the interview which led to the Carlin report took place some three years after the events in question.

Third. In *Jencks,* the court was dealing with statements which it regarded as the witnesses' own statements. See *supra,* pp. 32–34.

Here, the controversy relates to an interviewer's report. We are thus concerned with a type of "record" which is characteristically permeated by subjective impressions, opinions and interpretations, and which necessarily involves selection and synthesis.

Fourth. In *Jencks,* there was no efficacious means, other than the witnesses' prior statements, to determine what variations (if any) there were as between the witnesses' original accounts and their later trial testimony.

In the instant case, Carlin, following his interview with a Senate investigator, was examined at length before a Senate committee. The verbatim transcript of this prior sworn testimony was not only available to the defense, but was used by the defense on cross-examination.[15]

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[15] In addition, the summary was by a Senate investigator, not an agent in the executive branch; and the summary was not in the possession of the prosecutor when demand was made at the trial (*supra,* p. 18). However, we do not rest too heavily on these differentiating factors since the government did procure the Senate investigators' report and make it available to the Court of Appeals.

On the basis of these significant differences, we submit that the *Jencks* decision would not have required an order of production in the instant case.

IV. Any possible error in failing to order production of the summary of Carlin's interview had no effect whatever as to Wool and Lev and was harmless as to Rubin

A. Carlin did not implicate Wool and Lev, and the substance of his testimony as to Rubin was conclusively established by independent evidence, including Rubin's own testimony

Only petitioner Rubin moved for the production of the report of Carlin's statement to the investigator (R. 46). The failure of petitioners Lev and Wool to do so is readily understandable, for Carlin's testimony had no bearing on the case against them.

Carlin was an accountant for Bonita. Apart from identification of company records, his testimony was principally concerned with the early meetings which culminated in the decision of the company officers to avail themselves of Rubin's services. He gave no testimony at all concerning the "white hat" aspect of the conspiracy, which was the only aspect submitted to the jury in relation to Lev (Tr. 4053–4054, 4085, 4167–4169) and was the principal aspect so far as Wool was concerned. Even as to the "cap" contract, Carlin's testimony related very largely to events which occurred before Wool entered the picture and it did not implicate Wool. Counsel for Lev elicited from Carlin, on cross-examination, that Lev had nothing to do with the transactions which the witness described (R. 41). Counsel for Wool did not trouble to cross-examine (R. 64). *Supra,* pp. 16, 17.

Carlin's testimony was not significant in relation to Rubin. The fact that there were meetings

culminating in Bonita's decision to use Rubin's services as a means of procuring government contracts was not challenged. Rubin himself testified to this (Tr. 1928 *et seq.*, 1940–1941), as did Ades and Levy. There was no question but that Rubin made assurances, as Carlin testified, that he could "get" and "handle" the contracts (R. 26, 28, 31). Levy and Ades confirmed this (see Tr. 408, 3194). Rubin himself admitted that he told Bonita officers that he felt confident that he could get a bid (Tr. 1937); that he brought samples and the invitation to bid to the company officers (Tr. 1945); and that he later arranged for deviations from contract requirements (Tr. 1959–1960). He admitted that he knew Major Farnell (then the contracting officer) (Tr. 1950) and that he gave assurance that he knew his "way around" (Tr. 1937). The only testimony by Carlin which could possibly be said to conflict with Rubin's own testimony was Carlin's evidence that Rubin stated he would need expense money to return favors extended by government personnel (R. 30). But Levy testified unequivocally as to Rubin's expressed need to entertain and buy presents for the people on 16th Street (*i.e.*, the government employees) (Tr. 412). Rubin's co-defendant Ades reluctantly described this as expenses for "travel and entertainment" (Tr. 3196). Rubin himself said his request was for travel, or "if I had to take people to lunch, or anything involved with the business, expense-wise" (Tr. 1936). Carlin's testimony on this subject was cumulative.

Rubin's counsel inquired if Carlin had told the Senate investigators that it was he who had posted a

thousand dollar check to "Entertainment"—an entry which Carlin had testified he made after talking to Rubin and Levy (R. 48–49). If counsel intended by this inquiry to question Carlin's assertion that Rubin instructed him as to how to post the check, the query was unimportant. The company bookkeeper testified that Rubin gave the instructions as to how to charge checks made to cash, and that when she cashed them she gave the money to him (Tr. 1075, 1076). It was Levy who testified that Rubin said this particular check was needed to reward government personnel and that Rubin suggested that such payments be charged to "travel and entertainment" on the company books (Tr. 432–433). Moreover, any issue as to the credibility of Levy's testimony in relation to this one entry could not have been determinative in the face of the overwhelming evidence of Rubin's dispensations of money and gratuities likewise charged to "Entertainment."

The testimony of Levy ("devastating", in the words of the court below (R. 85)) developed the government's case in this respect in minute detail (Tr. 396-670; Statement, *supra*, pp. 7 *ff*). He told how he had come into a financially faltering business enterprise, bringing with him all his available funds (Tr. 399-400). He told how he and the other Bonita officers were encouraged by Rubin's assurances that he could obtain for them government business by influencing or bribing government personnel (Tr. 407–413, 416). Refreshing his recollection with corroborating company records and his own notations, Levy described how the proceeds of company checks, noted and charged in odd

amounts to "travel" or "entertainment", were turned over to Rubin to make cash payments to Wool and others at the procurement office (Tr. 439, 486, 504, 525, 528, 538, 541). He told of Wool's frequent visits to the company offices—at times to pick up gifts of clothing from Rubin (Tr. 550–552)—and of taking Rubin's advice that the company pay Wool's doctor bills because he (Wool) was helping it get more work (Tr. 543–544, 548, 560, 562). He told a similar story as to Mella Hort, a government contract administration clerk handling the Bonita account, who received from Rubin (at company expense) gifts of lingerie, a storm coat, and children's clothing (Tr. 460, 466, 469–470). Levy confirmed that the Bonita company paid bills for a deep-freeze and for meat to stock it, sent by Rubin to Porreca, chief inspector of the procurement agency (Tr. 511, 513), and he told how Porreca reassigned his subordinates at Rubin's pleasure (Tr. 444–445). He related Rubin's confidences regarding the white hat contract—how, after its award, Lev, alerted by Rubin, had come to New York from Chicago to give a disgruntled Wool $5,000 (Tr. 604–612) and how Lev, before its award, had plied Hort with money and clothing from Saks Fifth Avenue (Tr. 619–620).

Conclusive evidence was developed by the testimony of former government personnel, some of whom had succumbed to bribery; by Rubin's business and professional acquaintances; and by the trial and pre-trial admissions of the defendants themselves.

Rubin, testifying in his own defense, supplied some of the most damaging evidence at trial. He admitted his frequent social contacts with govern-

ment personnel assigned to the Bonita and white hat contracts (R. 1993, 1995, 2031–2032). He confirmed that he made gifts to Mella Hort (Tr. 2001, 2296). He admitted sending a freezer and meat to Porreca, the chief inspector, and taking Wool, the contract officer, to his doctor for treatment—in both cases instructing that the bills be sent to Bonita (Tr. 2002–2003; 2036–2039).[16] He identified a Christmas gift list, made out in his own handwriting, on which the names of government personnel appeared (Tr. 2382–2400). Behind Porreca's name was listed "freezer" (Tr. 2393); behind Wool's "$200 (money)" (Tr. 2394).

Rubin admitted asking Wool for the R & J contract (*supra*, p. 11), which he subsequently got (Tr. 2032, 2033). He confirmed that he arranged for deviations from contractual specifications (Tr. 1959, 1961, 1968, 1985–1989). He admitted that he asked Porreca to remove inspectors whom he did not like (Tr. 1970–1973, 2013, 2357), in one instance contacting a replacement himself (Tr. 1976).

Rubin admitted receiving various large checks from Bonita, offering the explanation that they were for services rendered although it appeared that he was

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[16] Rubin's attempt to explain away these admissions was ludicrous. He said that he had the freezer bill sent to Bonita because Porreca's wife would complain about the expense of buying a freezer (Tr. 2003). The court reminded him that he had just testified that Porreca had told him that his wife thought it would be a good idea to get a deep-freeze (Tr. 2003). He indicated that Porreca had promised to reimburse him (Tr. 2003), a fact denied by Porreca (Tr. 2004). He admitted that he never was repaid by Porreca (Tr. 2005), or by Wool for the doctor's bill (Tr. 2041).

working on a percentage-of-profits basis; this money, he conceded, was not included as income in his tax reports (Tr. 2469–2482, 2491). His testimony confirmed and corroborated practically every detail of Levy's testimony as to the time and amount of gratuities and payments made to government personnel.

In addition, there was testimony of the former chief inspector of the procurement agency, Porreca, who confirmed that he received a deep-freeze, meat, and lingerie from Rubin (Tr. 1227–1233); that he had a subordinate, of whom Rubin had complained, transferred from the Bonita plant and replaced with another whom Rubin thought a "pretty good fellow" (Tr. 1214, 1221–1226). Porreca testified further that he made another such transfer with respect to Lev's white hat contract, again at Rubin's request (Tr. 1254), and subsequent to the time he had been handed, surreptitiously, a white envelope by Lev (an envelope containing a thousand dollars) (Tr. 1249–1253); that he expedited, at Rubin's request, the pre-award survey on Lev's white hat contract (Tr. 1242–1243); that when he mentioned the resulting report finding Lev's facilities adequate despite the lack of machinery and personnel, Rubin assured him that Wool was assisting them—was one "of the boys" (Tr. 1244–1245).

Other government personnel assigned to these contracts likewise testified to grave indiscretions committed at Rubin's request. One inspector verified that he had lived in Puerto Rico at Bonita's expense while performing his duties for the government (Tr. 1351–1352) and that he sent the defective hats he found to Rubin instead of his superiors (Tr. 1353).

A government accountant admitted that he went to Puerto Rico under an assumed name for a small fee, and at Bonita's expense, to perform a service for the company (Tr. 1159–1171). The contract administration clerk, Mella Hort, who handled and granted Bonita's requests for deviations from contract requirements, admitted that she received gifts from Rubin—a storm coat and lingerie for herself, and coats for her children (Tr. 3317, 3322, 3323). She also told of receiving two expensive suits from Lev, purchased at Saks Fifth Avenue, just prior to the award of the white hat contract (Tr. 3400–3401).

A lingerie manufacturer told of billing merchandise to Bonita (Tr. 1140); an executive of an appliance company told of sending a freezer to Porreca and billing Bonita (Tr. 1190). A doctor testified that Rubin brought Wool to him for treatment and that his bill, including services to Wool and Rubin, was paid by a check from Bonita (Tr. 1144, 1146). A company bookkeeper told of Rubin's social engagements with Wool and Mella Hort (Tr. 1075). Circumstantial evidence developed through the testimony of a banker, a hotel employee, a real estate dealer, and an alleged lender of money, provided persuasive evidence that Lev paid a large sum of money to Wool after the award of the white hat contract, a fact to which Levy had testified (Tr. 1132, 1411, 1417, 1487, 604–612).

In the face of all this evidence, Carlin's entire testimony could have been omitted without the slightest injury to the government's case. In those circumstances, we submit that it would be magnifying

a rule intended to do justice into the opposite to hold that it was reversible error to fail to obtain, from a Senate Committee, as to this secondary witness—who at most implicated only petitioner Rubin, largely on the basis of facts which Rubin admitted—a document which the witness had not seen, which the prosecutor did not then have, and which was not in the words of the witness but was merely a summary of what he had said three years after the events.

B. The rule of harmless error applies, in proper cases, to a failure to produce statements or reports of a witness

In *Jencks,* this Court stressed the crucial nature of the testimony of the witnesses Ford and Matusow. Not only were they the principal witnesses in a case proved entirely by circumstantial evidence, but their testimony was necessary to bridge a gap in the government's evidence—since the evidence established Jencks' membership in the Communist Party on April 28, 1950, the date on which he was alleged to have sworn falsely to the contrary, only by Ford's testimony that between October 1949 and August 1950 (the date when Matusow knew Jencks) the Communist Party took no disciplinary action against Jencks (see 353 U.S. at 660). Stressing the importance to the defendant of the impeachment of that testimony, and the value of the reports in doing so, the Court reversed. Even so, Justices Burton and Harlan, concurring in the result, did not believe that the failure to order production of the prior statements of these witnesses necessitated a new trial. They indicated that, except for other errors committed during trial, they would have remanded to

the trial court for a determination of whether, in the light of the whole record, non-production was prejudicial, saying (353 U.S. at 678):

> * * * If the reports contain material that the trial court finds has evidentiary value to petitioner, a new trial should be granted in order that petitioner may use it. But if the reports do not contain contradictory or exculpatory material helpful to petitioner, no possible prejudice could have resulted from the trial court's denials of petitioner's motions. * * *

We do not believe that the *Jencks* opinion stands for the proposition that never, under any circumstances, may the failure to produce as to any witness, no matter how inconsequential, be deemed non-prejudicial. Nor have the lower courts proceeded on that assumption. See *United States* v. *Sheba Bracelets,* 248 F. 2d 134 (C.A. 2), certiorari denied, 355 U.S. 904; *Simms* v. *United States,* 248 F. 2d 626, 629–630 (C.A.D.C.), certiorari denied *sub nom. Duncan* v. *United States,* 355 U.S. 875; *Padron* v. *United States,* 254 F. 2d 574, 576 (C.A. 5), certiorari denied, 358 U.S. 815; *United States* v. *Rosenberg,* 257 F. 2d 760 (C.A. 3), pending on writ of certiorari, No. 451, this Term; *Harris* v. *United States,* 261 F. 2d 792 (C.A. 9), petition for a writ of certiorari pending, No. 619, this Term.[17]

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[17] In *Bergman* v. *United States*, 253 F. 2d 933 (C.A. 6), where the court did not have the prior statement before it, it declined to speculate as to whether the failure to turn over the document could be non-prejudicial in the circumstances of that case. But cf. *United States* v. *Miller*, 248 F. 2d 163 (C.A. 2), certiorari denied, 355 U.S. 905, discussed *supra*,

Rather, we think that the reasoning of both the majority and the concurring opinions in *Jencks* points up, with regard to production of documents, what is a truism in other areas: by its very nature harmless error is a problem which must be resolved on the particular facts of each particular case. As this Court said in *Kotteakos* v. *United States*, 328 U.S. 750, 761, the discrimination required in deciding whether an error is technical or substantial "is one of judgment transcending confinement by formula or precise rule." And further, at p. 762, "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations. * * * Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the bal-

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pp. 62–63 where the Second Circuit was unwilling to assume that prejudice resulted from failure to turn over a statement where the trial court had found that the statement did not relate to the testimony of the witness.

Some language in a recent "Jencks" Act decision of the Third Circuit, *United States* v. *Prince*, C.A. 3, No. 12,785, decided March 18, 1959, might be read as declaring that the rule of harmless error could never be applied in a case involving an erroneous failure to produce. But in that case the reports were those of a prime government witness and apparently related to crucial testimony at the trial; and the Third Circuit was probably holding that *in such circumstances* it would not canvass the record to see whether production of the report would conceivably have produced a different verdict. It is significant that the Third Circuit did not express disagreement with, or disapproval of, its earlier opinion in the *Rosenberg* case, No. 451, in which it did apply the rule of harmless error in a "Jencks" Act context (see R. in No. 451, R. 96).

ance for decision on the case as a whole, are material factors in judgment." In the light of all the evidence in this case, plus the other means available for testing Carlin's credibility, the failure to order production of a summary of a Senate investigator's interview with this secondary witness does not justify reversal of this conviction.

C. The ruling as to Carlin's testimony did not permeate the trial

Apparently realizing the unimportance of Carlin's testimony *per se,* petitioners Rubin and Wool attempt to give significance to the ruling on Carlin's testimony by asserting that, since Carlin was an early witness, the ruling must be assumed to have influenced their later conduct and kept them from making demands as to other witnesses. It is admitted that petitioners made no demand at the trial for these other documents which they now say were important. The contention that counsel could not, in view of the one ruling, have demanded production of other documents without risking prejudice to their clients is unconvincing. Counsel showed no such reluctance as to objections made to the admissibility of evidence; they reiterated, to a man, their positions with such frequency and perseverance as to prompt one counsel to refer to them as a "regular omnibus objection" (Tr. 474) and to cause the court to state at intervals that he would consider the objections made (see, *e.g.,* Tr. 441–442, 434–435, 481, 490–491, 500–500A, 502, 504, 509, 511, 526, 556).

This case was being tried in the Second Circuit which had what was considered, at the time, an advanced rule as to production. On some slight show-

ing of inconsistency, the trial judge was required to examine a prior statement by the witness to see if it might have impeaching value. *E.g., United States* v. *Krulewitch,* 145 F. 2d 76, 78 (C.A. 2); *United States* v. *Cohen,* 145 F. 2d 82, 92 (C.A. 2, certiorari denied, 323 U.S. 799–800; *United States* v. *Ebeling,* 146 F. 2d 254, 256 (C.A. 2). The trial judge had indicated, in ruling on Rubin's demand for production as to Carlin, that he would look at a document if there were "something that tends to make us believe that there was something inconsistent" in it (R. 74). To say that this ruling deterred or intimidated counsel from attempting to obtain other statements is an attempt to find some basis for asserting prejudice where none in fact exists. None of the petitioners established that any witness other than Carlin had given a written statement capable of being produced and, with one exception, the few inquiries made about interviews with investigators were not directed toward the showing of any inconsistency.

Thus, witness Levy was asked by counsel for Lev whether he told Balaban and Poole (the Senate investigators) that he would be glad to assist them—*i.e.,* to testify against Lev—or whether he had even mentioned the name of Lev. Levy replied in the negative. The matter was pursued no further (Tr. 683–684). Counsel for Rubin inquired whether Levy signed a statement for any law enforcement agency. He replied that he did with respect to the Senate. Asked if he signed a statement for Balaban and Poole, he said he did not remember but did remember speaking to them (Tr. 714–716). All this was asked,

counsel indicated, for the expressed purpose of showing that Levy must have known that he himself had violated the law (Tr. 717–718). Another reference to interviews with government investigators came during the cross-examination of Porreca, the Government's chief inspector, when counsel for Lev told the witness when he had been questioned by people connected with the Senate Committee, drew from him an admission that he had lied at that time, and at Senate executive hearings (Tr. 1268–1272), and then went on to question him at length about his recorded testimony before the full Committee at which time he admitted having lied before the executive committee (Tr. 1272, *et seq.*). Obviously, counsel could have had no further interest in this matter for impeachment purposes since the witness readily admitted that he had lied initially to investigators. In short, it is clear that petitioners were not too much concerned about seeing statements made to investigators. This is understandable since they had access to the testimony of the witnesses recorded at the Senate hearings—testimony which they used extensively for impeachment purposes (see, *e.g.*, R. 66, Tr. 678, 687, 702, 762, 778–779, 811, 844, 849, 894, 1063, 1101, 1118, 1184, 1273–1274, 1326–1327, 1433–1434).[18]

The question of Levy's Arabic notes, now made an issue by petitioner Rubin, was considered only at the pretrial hearing (P. Tr. 51–60). The United States Attorney then informed the court that there were such

[18] We re-emphasize that no demand was made for Senate testimony, if any, recorded in executive session.

notes in existence made by a prospective government witness; that they had been translated by an employee of the Library of Congress together with the witness who had recorded them; and that, because defense counsel had voiced some objection to the fact that the witness had helped in the translation (P. Tr. 51, 59), it was thought best that an independent translation be made. He indicated that he was having some difficulty locating a translator and that he intended to get an independent translation only of certain portions of the notes which he intended to use at the trial, not as evidence, but for the sole purpose of refreshing the recollection of the witness; that these portions would be available to the defense, but that he did not want to release the remaining portions which were not to be retranslated or used in any way. The court said that if it became apparent at the trial that these other portions, not to be independently translated, were important, the court would make a decision at that time as to whether they, too, should be made available to the defense. Counsel indicated that he "anticipated" that this would be the court's treatment of the matter at this time (P. Tr. 57), and that he understood "very clearly" that the problem would depend on the state of cross-examination at the trial (P. Tr. 59). At trial, no request was made by the defense to see any other portions of the notes. The issue of the production of the Arabic notes thus has no relation to the ruling on production of the report of Carlin's interview with the Senate investigator.

In sum, the denial of the request for production of the summary was insignificant in relation to the whole case and cannot be given some significance by a late attempt to connect it with other events at the trial. Petitioners were justly convicted on overwhelming evidence after a trial in which their rights were fully protected. There is no occasion for reversal of the conviction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
BEATRICE ROSENBERG,
JULIA P. COOPER,
JEROME M. FEIT,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 435

HARRY LEV,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER LEV.

ANTHONY BRADLEY EBEN
135 South La Salle Street
Chicago 3, Illinois

The Scheffer Press, Inc.—ANdover 3-6850

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Argument:

I. Summaries of oral statements by a witness to a government agent are discoverable under 18 U.S.C. § 3500 and also under *Jencks* v. *United States*, 353 U. S. 657, since the statute does not provide exclusive means by which such reports are made producible. Title 18 U.S.C. § 3500 is unconstitutional if it be construed to prohibit such production. 2

A. The government's contention that 18 U.S.C. § 3500 is exclusive as to procedure governing production of statements of witnesses is incorrect. Accordingly, they are producible under *Jencks* v. *United States*, 353 U. S. 657 even though such statements and reports may be inadmissible in evidence. 3

B. Summaries of oral statements of government witnesses are discoverable under 18 U.S.C. § 3500. If not, the statute is unconstitutional and infringes upon the due process requirement of *Jencks*. 6

II. The circumstances relied on by the government to justify the examination by a reviewing court of extrinsic evidence have no application here. In any event, such examination may never be made in derogation of defendant's right to cross-examine with respect to such extrinsic evidence. 7

III. The trial court's failure to order production of the summary of Carlin's statement deprived Petitioner of substantial rights. It therefore constituted reversible error. 10

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REPLY BRIEF FOR PETITIONER LEV.

PRELIMINARY STATEMENT.

The government's brief was served upon Petitioner one week prior to the argument before this Court. Because of this limitation of time, we respond to only the more salient government arguments. Accordingly, Petitioner here deals principally with the government's misinterpretation and misconception of *Jencks* v. *United States,* 353 U. S. 657 (1957) and 18 U.S.C. § 3500. Further, the Court's attention is again called to the flagrant error of the court below arising from its *in camera* examination of *ex parte* documents dehors the record and the government's failure to justify such examination. Finally, Petitioner urges that the errors here involved are most serious and harmful to him and deprive him of basic constitutional rights.

ARGUMENT.

I.

SUMMARIES OF ORAL STATEMENTS BY A WITNESS TO A GOVERNMENT AGENT ARE DISCOVERABLE UNDER 18 U.S.C. § 3500 AND ALSO UNDER JENCKS v. UNITED STATES, 353 U. S. 657, SINCE THE STATUTE DOES NOT PROVIDE THE EXCLUSIVE MEANS BY WHICH SUCH REPORTS ARE MADE PRODUCIBLE. TITLE 18 U.S.C. § 3500 IS UNCONSTITUTIONAL IF IT BE CONSTRUED TO PROHIBIT SUCH PRODUCTION.

The government's argument under Point I, here paraphrased, is that 18 U.S.C. § 3500 clarifies the decision of this Court in *Jencks* v. *United States*, 353 U. S. 657 (1957), and now provides the exclusive procedure by which a defendant may inspect a statement or report made to a government agent by a witness testifying against him; that 18 U.S.C. § 3500 reasonably and with a rational basis in experience excludes summaries prepared by agents of such statements[1]; that therefore the Carlin report being such a summary would not be producible to Petitioner in the event of a new trial (Govt. bf. pp. 30-61).

It is respectfully submitted that both of these premises are wrong. Further, to the extent that 18 U.S.C. § 3500 seeks to avoid the production of such summaries it is unconstitutional.

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[1]The government argues that **Jencks** supports this premise. (Govt. bf. pp. 56-58). Under its Point III, it argues that such summaries are not producible under **Jencks.** These arguments are substantially the same. Therefore, in order to avoid repetition, Petitioner responds to them under his Point I.

A. The Government's Contention that 18 U.S.C. § 3500 is Exclusive As to Procedure Governing Production of Statements of Witnesses is Incorrect. Accordingly, They Are Producible Under Jencks v. United States Even Though Such Statements and Reports may be Inadmissible in Evidence.

Petitioner has heretofore contended that the so-called *Jencks* statute was not exclusive by referring to its express terms and to its legislative history indicating the intent of Congress that it do not supersede or nullify production of statements otherwise required by any rule of court or procedure (Pet. bf. pp. 10-15). The government has failed to respond to Petitioner's argument in this respect except to state that Senate Report No. 981 and Senator O'Mahoney's brief filed with the Senate refer to that procedure as exclusive (Govt. bf. p. 49; Govt. bf. *Rosenberg* v. *United States,* No. 451, p. 35). This is hardly a response since the Senate report referred to related to the bill as originally proposed and prior to the amendments discussed by Petitioner. Further, Senator O'Mahoney's brief indicated on its face that the procedure discussed was not exclusive (103 Cong. Rec. 15939).

Petitioner also argued that since 18 U.S.C. § 3500 is not exclusive and was not intended to be, the Carlin statement, although a summary, is discoverable under *Jencks.* (Pet. bf. pp. 13-15).

The government attempts both here and under Point III of its brief to meet this by relying upon a statement of this Court in *Jencks,* taken out of context, to the effect that the tests of inconsistency for impeachment purposes when applied to a prior statement include not only flat contradiction but also omission of facts, a contrast in emphasis as to those facts and even a different order of treat-

ment. The government reasons that these tests are applicable only to prior statements "fully and directly attributable to the witness himself—as either his own written statements or their equivalent," since he cannot be impeached by a written report of what an investigator "said he said." (Govt. Bf. pp. 51, 56-58, 68, 69).

The argument of the government misconceives Petitioner's position in this respect as well as the rationale of the *Jencks* decision. Petitioner has never contended that a summary of Carlin's statement prepared by the Senate investigators could ever be introduced in evidence to impeach Carlin. He has only maintained that the summary is producible to him for such use in the cross-examination of Carlin as Petitioner is able to make. This Court has made clear in *Jencks* that this is his right when it stated, 353 U.S. 657, 669:

> "Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—*e.g.*, evidentiary questions of inconsistency, materiality, and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant."

This statement of two different standards of relevancy and materiality is a recognition by the Court that a report useful for discrediting purposes is producible even though *never admissible in evidence*. It follows, then, that inadmissible (hearsay or summary) reports of what a witness said are producible if his statements, no matter how reported, relate to the events concerning which he has testified. Such reports obviously could be effective on *cross-examination* to discover flat contradictions, omissions of

fact, contrasts in emphasis and a different order of treatment. If so, impeachment would follow *not* by introduction of the inadmissible report but by the verbal sworn testimony of the person to whom the statement was made. Such impeachments are commonplace in our courts. Accordingly, the hassles and harassments referred to by the government (Govt. bf. pp. 58-61) are highly illusory.

The government, also under its Point III, argues that *Jencks* does not here govern because 1) Carlin was not a crucial witness, 2) his statement to the Senate investigators was made long after the events it described and 3) he testified before a Senate Committee following his interview with the Senate investigators and the transcript of that testimony was utilized by the defense (Govt. bf. pp. 68, 69).

It is submitted that none of these arguments is valid. 1) Carlin was a most crucial witness as is hereinafter discussed (pp. 14-15). 2) The value of Carlin's prior statement does not depend upon its relation in time ot the events to which it refers. Its function in impeachment may be to demonstrate the witness' "capacity to err," "a moral disposition to lie," "partisan bias," "faulty observation" or "defective recollection." The inconsistent prior statement does not have any substantive testimonial value. III Wigmore, Evidence (3rd Ed. 1940) Secs. 1017, 1018). 3) The government's last mentioned argument hardly deserves response since it assumes that Carlin's statement to the Senate investigators and his testimony before the Senate Committee were the same.

B. Summaries of Oral Statements of Government Witnesses are Discoverable under 18 U. S. C. § 3500. If not, The Statute is unconstitutional and Infringes upon the Due Process Requirements of Jencks.

The government argues that 18 U.S.C. § 3500 requires production of only those statements of a witness to a government agent which could be used to impeach him.[1] It urges that this is a reasonable exercise of Congressional power to prescribe rules of evidence and procedure and has a rational basis in experience since one ought not to be impeached by a statement not his own (Govt. bf. pp. 49-55).

This construction of 18 U.S.C. § 3500 by the government drastically limits *Jencks* since under that decision inadmissible reports of oral statements are subject to production. But the government's construction cannot be correct since Congress and the government have piously avowed from time to time that 18 U.S.C. § 3500 was enacted merely to clarify the principle of *Jencks* and not in any sense to restrict it (Govt. bf. pp. 38-49).

Moreover, if Congress had intended to require the production only of reports of statements which were relevant and material in the evidentiary sense, then, despite its protestations to the contrary, it is in direct collision with the ruling of this Court. The question then arises as to the nature of that ruling. It is submitted that the language of this Court makes clear that a constitutional question of due process was decided. The Amici brief filed in *Rosenberg* v. *United States*, No. 451, elaborates this argument. Therefore, if Congress intended to abridge the *Jencks* ruling, 18 U.S.C. § 3500 is unconstitutional.

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[1] If the government is correct in this assertion, the main thrust of the statute is to reinstate the practice as to production of statements to the same status as pre-Jencks.

II.

THE CIRCUMSTANCES RELIED ON BY THE GOVERNMENT TO JUSTIFY THE EXAMINATION BY A REVIEWING COURT OF EXTRINSIC EVIDENCE HAVE NO APPLICATION HERE. IN ANY EVENT, SUCH EXAMINATION MAY NEVER BE MADE IN DEROGATION OF DEFENDANT'S RIGHT TO CROSS-EXAMINE WITH RESPECT TO SUCH EXTRINSIC EVIDENCE.

The government contends that the court below acted in the best judicial tradition in considering *in camera* the sealed Carlin statement and *ex parte* affidavits dehors the record supporting it. It urges that a "court may consider matters outside the record to determine whether a controversy does in fact exist." (Govt. bf. pp. 61, 62).

The cases cited in support of this proposition are singularly inapposite. They deal with the power of a court to consider extrinsic evidence when questions are raised as to mootness, collusiveness or the existence of a justiciable issue. The cases cited (*Mills, Kimball, American Book*) dealing with mootness decide only that if an event occurs *pending an appeal* rendering impossible the granting of any effectual relief, that event may be proved by extrinsic evidence. In reality this is merely a recognition that a court may at any time examine into its own jurisdiction. *Kimball* v. *Kimball*, 174 U. S. 158, 162 (1899). Of course, no jurisdictional problem was here raised by the filing of the sealed Carlin statement. Further, there is nothing in the foregoing cases indicating that even where it is proper to consider extrinsic evidence such consideration may be had *ex parte* and *in camera*.

The government's contentions, carried to their logical conclusion, would permit a reviewing court to consider *ex parte* evidence *in camera* even though it was never intro-

duced at the trial or made part of the record on appeal merely because such evidence, if believed by the court, would induce it to deny relief. This is an absurdity.

The government's cases (*Doremus* and *Johnson*) dealing respectively with the absence of a justiciable issue and collusiveness both indicate that the decisions were reached after a consideration of the trial court record. In *Doremus* the reviewing court considered the pleadings and in *Johnson* it dealt with affidavits and counter-affidavits filed in the trial court on a motion to dismiss. These cases involve situations entirely different from the case at bar and are not relevant to it.

The government also contends that there was no necessity for a *voir dire* examination of Senate investigator Balaban whose *ex parte* affidavit was considered by the court below (Govt. bf. pp. 63-65). That affidavit was to the effect that the sealed Carlin statement transmitted by the prosecutor was a memorandum prepared by Balaban of an oral statement made to him by Carlin, that it was not signed or adopted by Carlin and was not "a substantially verbatim recital" of that statement (R. 77, 78). The government urges that the definition of a statement under 18 U.S.C. § 3500 is so clear that no examination of Balaban could possibly bring the memorandum prepared by him within that definition (Govt. bf. p. 63). It must be kept in mind that petitioner has never seen the memorandum at all. He has no information relative to it except Balaban's description, purposely couched in the precise language of 18 U.S.C. § 3500, which was accepted by the court below at face value, plus the statement of the court below that "internal evidence" from the memorandum "tends" to bear out the Balaban description (R. 85). The reliance of the court below on Balaban's affidavit and its

less than positive statement as to the contents of the memorandum emphasize the serious error in depriving Petitioner of his right to cross examine.

The error in this denial is compounded when the state of the record before the court below is considered. In the trial court, Carlin, on cross examination, stated that he had given a statement concerning the events to which he had testified to Senate investigators Balaban and Poole and that he believed he had signed it (R. 46). This testimony was not challenged on the government's redirect examination and stood unopposed at the time *Jencks* was handed down and while the case at bar pended on appeal. There can be no question but that upon such a record reversal would have been mandatory under *Jencks* and also under 18 U.S.C. § 3500.

However, the filing of the Balaban affidavit, even if proper, raised an issue of fact as to whether there actually was in existence a signed Carlin statement. Had this issue been decided in favor of Petitioner, it would have assured reversal, as above stated, under both *Jencks* and 18 U. S. C. § 3500. The court below decided this issue adversely to Petitioner. It did and could have done so only by completely disregarding Carlin's sworn testimony and by giving full credence to the *ex parte* statement of one never submitted to the test of cross-examination. This is a clear violation of petitioner's constitutional rights under the Fifth and Sixth Amendments.

III.

THE TRIAL COURT'S FAILURE TO ORDER PRODUCTION OF THE SUMMARY OF CARLIN'S INTERVIEW DEPRIVED PETITIONER OF SUBSTANTIAL RIGHTS. IT THEREFORE CONSTITUTED REVERSIBLE ERROR.

A. The Form of the Indictment and the Trial Court's Failure to give Adequate Instructions Tied Petitioner's Fate to that of the Other Defendants.

The government's argument that the trial court's ruling on the Carlin report "had no effect whatever" as to Petitioner Lev (Govt. bf. p. 70) is a bare conclusion which ignores the record of a long and difficult trial.

Most of the trial's complexities were of the government's own making. They arose from the prosecution's insistence on joining nine defendants in a single trial for an alleged single conspiracy notwithstanding repeated and continuing objections by Petitioner that the evidence would—as it did—disclose at least two conspiracies, in one of which Petitioner admittedly had no part.[1] Having effectively employed the conspiracy dragnet to facilitate the jury's transference of guilt to Petitioner, the government now contends that in assessing the effect of an error made in the course of the trial, such assessment be made without any reference to the proof of the alleged conspiracy but only by testing the immediate relevance of the error to Petitioner. This argument is not only grossly unfair but unrealistic.

---

[1] Evidence was actually offered by the government of conspiracies relating to the procurement and administration of (a) a 1952 contract to manufacture garrison hats for the Army (hereafter referred to as the Bonita conspiracy) and (b) a 1953 contract to manufacture sailor hats for the Navy (hereafter referred to as the White Hat conspiracy). The government in the court below and the Court of Appeals conceded that Petitioner had no connection whatsoever with the Bonita conspiracy. (Tr. 4429-4494, 46).

Petitioner has maintained consistently that he was grievously prejudiced from being subjected to a trial involving a conspiracy (the Bonita contract) with which he had admittedly no connection.[1] Thousands of pages of testimony and hundreds of exhibits were devoted to the multifarious transactions and ramifications of that conspiracy. But for the aura of wholesale bribery and corruption which this evidence tended to generate—and inevitably associate with Petitioner in the minds of the jury—Petitioner might very well have been acquitted. Cf. *Paoli* v. *United States*, 352 U.S. 232 (1957).

The instructions of the trial court were far from adequate in protecting Petitioner from prejudice. The inconsistent, ambiguous and repetitious instructions which the trial court endlessly interspersed throughout the trial were likely to confuse the most clear-headed juror. Throughout the trial, the court vacillated between submitting the case to the jury on the theories of one conspiracy and two conspiracies (Tr. 46, 100, 101, 114, 115, 402, 483, 539, 1536-1538, 1840, 1843-1846).[2] He repeatedly told the jury that if Petitioner joined the conspiracy after it once commenced, he was chargeable with the prior acts and declarations of the other conspirators (Tr. 103, 115, 402). At the conclusion of the case, the trial court instructed the jury that there were two conspiracies and that Petitioner was not involved in the Bonita conspiracy (Tr. 4042, 4085). However, these instructions were buried in a 96-page charge which contained other instructions from which the jury could reasonably conclude that they were free to find that Petitioner had engaged in a single conspiracy with all other defendants, as charged in the indictment, and that, if the jury so

[1] See, e.g., Petition for Writ of Certiorari, pp. 12-22.

[2] References prefaced by "Tr." are to the trial transcript on file with this Court.

found, Petitioner would be bound by the acts and declarations of every other defendant (Tr. 4036, 4037, 4047, 4048, 4090, 4096).

The confusion inherent in these instructions and the jury's failure to understand them is demonstrated by the fact that the jury deliberated for approximately twelve hours and time and again returned to the courtroom to request further instructions. Significantly, the jury's final request was for an answer to the following question:

> "If a conspiracy existed on the Bonita contract and was not terminated by some act of the conspirators, does it then follow that:
>
> (a) The conspiracy continued during the course of the White Hat contract.
>
> (b) There had to be a conspiracy on the White Hat contract" (Tr. 4167).

The jury's question plainly indicated their inability to distinguish between the two conspiracies. In reply, the trial court instructed the jury that if they found that certain defendants were engaged in the Bonita conspiracy they could then find that as to some of these defendants there was a continuing conspiracy into the White Hat transactions (Tr. 4168). He then again stated that Petitioner was not a member of the Bonita conspiracy and could not be convicted unless the jury found him to be a member of the White Hat conspiracy (Tr. 4168, 4169). However, the judge then immediately repeated his earlier instruction that a conspiracy continues as long as there is an intention to continue it and that each conspirator "who is the agent of the other at *some time during the life of the conspiracy*, remains an agent during *all* of its existence" (Tr. 4169, emphasis added).

This last instruction completely destroyed any earlier efforts the trial court might have made to protect Petitioner from the Bonita evidence. Being a last-minute instruction, it should have been given with special care since the last word is often decisive. *Bollenbach* v. *United States*, 326 U. S. 607, 612 (1946). Nevertheless, this final instruction could be reasonably interpreted by the jury that they could find that there existed only one conspiracy and that all acts and declarations of those defendants who had engaged in the Bonita transactions were admissible against Petitioner although he might not have entered the conspiracy until its later White Hat phase. Significantly, within approximately one hour after this instruction, the jury found the Petitioner guilty (Tr. 4177).

Because of the trial court's inadequate instructions and its failure to resolve for the jury whether this case involved two conspiracies or a single conspiracy in two phases, the fact that Petitioner was not mentioned in Carlin's testimony is immaterial. If, as the facts tend to show, the jury understood the case to present a single conspiracy, the point that Carlin's testimony did not specifically involve Petitioner becomes entirely unimportant if Petitioner, in the jury's view, entered the alleged conspiracy at its later White Hat phase. Thereupon, under the court's instructions, the jury was required to consider Carlin's testimony also against Petitioner.

Moreover, even if the jury understood the case to present two distinct conspiracies, the result was the same. There is nothing in the great bulk of Carlin's testimony which ties it exclusively to the Bonita conspiracy. Carlin's testimony with respect to the relationship of defendant Rubin with certain other defendants is as pertinent to the White Hat conspiracy, in which Petitioner was al-

legedly involved, as to the Bonita conspiracy, in which he admittedly was not. In either event Petitioner was affected by Carlin's damaging testimony.

It follows that if the failure to compel the production of the Carlin statement was prejudicial to any of the defendant conspirators, it was prejudicial to Petitioner.

B. The Trial Court's Ruling on the Carlin Statement was Prejudicial Error.

The importance of Carlin's testimony can be appreciated only upon considering the sequence and character of the government's witnesses. Carlin was the first important government witness and the first witness to testify about the alleged conspiracy. It was Carlin's testimony which laid the groundwork for the government's entire case. His testimony—supplemented and explained by the trial judge in the presence of the jury (R. 46-48)—went to the inception and purpose of the alleged conspiracy and the means by which it was to be carried out. It opened the door and gave meaning to all the evidence that followed. Notwithstanding the government's contention to the contrary, Carlin's was the primary testimony with respect to the formation of the alleged conspiracy and that of Levy, Porreca and others was secondary and cumulative. Moreover, of all of the important government witnesses Carlin was the only one whose credibility was free from the taint of participation in the conspiracy or of admitted perjury. His occupation of certified public accountant may have further added to his influence on and credibility with the jury.

The inhibiting effect of the trial court's erroneous ruling on the cross-examination of all subsequent witnesses has been ably and fully dealt with in Part IV of Petitioner Rubin's brief. It need only be added here that Petitioner

Lev was in every way as adversely affected by this development as any of the other defendants.

The government's glib contention that defense counsel was not deterred by the court's emphatic ruling from requesting the production of other statements (Govt. bf. pp. 80-81) is both gratuitous and irrelevant. A reading of the record discloses that the trial judge had little patience with what he deemed unnecessary or lengthy objections or requests of counsel. Trial counsel for Petitioner, along with other counsel, came in for his full share of continuous judicial admonishment. After the court had taken time in chambers to carefully explain its position on the Carlin statement (R. 74), any further requests for statements of other witnesses would have been not only fruitless but foolhardy. In any event, failure to make such idle motions did not waive Petitioner's rights. The government's brief fails to cite a single authority to the contrary.

C. In the Face of the Jencks Rule the Trial Court's Ruling is Inherently Prejudicial.

The circumstances in the case at bar establish that the trial court's ruling had a substantial effect on the verdict. *Kotteakos v. United States*, 328 U.S. 750 (1946). However, even in the absence of such effect, the verdict would have to be reversed under the *Jencks* rule. This follows from the teaching of *Jencks* that the denial to an accused of evidence relevant and material to his defense is inherently prejudicial and harmful. An exposition of this argument is contained in the Amici brief filed in *Rosenberg v. United States*, No. 451, and, therefore, need not be restated here.

The government's attempt to refute this position is completely ineffectual. Its argument from the concurring

opinion of Justices Burton and Harlan in the *Jencks* case (Govt. bf. pp. 77-78) proves too much. Had the majority of this Court believed that an inquiry into the prejudicial effect of the trial court's ruling in that case was proper, it could have remanded to the trial court, just as the concurring justices suggested, for a determination of whether, in the light of the whole record, the denial to the defense of the statements was prejudicial. But it is precisely the holding that neither the trial court nor the prosecution—but only the defense—can and should have the occasion to make a determination of this nature which forms the heart of the majority's decision. Whether *Jencks* was founded on due process or not, a violation of its rule should be all that need be shown to obtain a reversal.

CONCLUSION.

The conviction of Petitioner was obtained in a trial in which there was a clear violation of the *Jencks* rule, both as defined by this Court and as enacted by Congress. Such violation constituted prejudicial error and deprived Petitioner of constitutional rights. The conviction must, therefore, be reversed.

Respectfully submitted,

Anthony Bradley Eben,
Attorney for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1958

RAYMOND WOOL,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT H. TREITMAN,
Attorney for Petitioner,
Office & P. O. Address,
261 Broadway,
New York 7, New York.

LOWER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

RAYMOND WOOL,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

Raymond Wool, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered the 11th day of August 1958.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit has not been officially reported. A copy of this opinion is hereto annexed and marked Exhibit "A".

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit which is sought to be

reviewed herein was made and entered on the 11th day of August 1953.

No motion for an order requesting a rehearing was made to the United States Court of Appeals for the Second Circuit. By order of Mr. Justice Harlan, the petitioner's time to file this petition was extended to and including October 10th, 1958.

The jurisdiction of this Court is invoked under Title 28, Section 1254 (1) U. S. C.

Certiorari is sought on the grounds, that the United States Court of Appeals for the Second Circuit has rendered a decision on important questions of Federal Law which are in conflict with the applicable decisions of this Court and is in conflict with decisions of the Court of Appeals of other circuits and requires clarification by this Court so as to make more definite and certain the Federal Law dealing with interpretations of the statutes or statute involved.

Questions Presented for Review

The petitioner, Raymond Wool, was convicted in the United States District Court for the Southern District of New York for the crime of conspiracy in violation of Title 18, Section 371 U. S. C. upon a verdict of a jury. A copy of the indictment upon which petitioner was tried is hereto annexed and marked Exhibit "B" hereof. On May 15th, 1957, said judgment of conviction was duly entered and the petitioner was sentenced to a term of imprisonment of 18 months and was fined in the sum of $1,500.00. Thereafter said judgment of conviction was affirmed by the United States Court of Appeals for the Second Circuit on August 11th, 1958. The petitioner was continued on bail pending said appeal and is presently free on said bail.

The questions presented for review are as follows:

1. Whether the trial court substantially prejudiced the rights of the petitioner when it permitted the Government to prove multiple conspiracies under a count of the indictment which alleged a single conspiracy, in violation of the determination of this Court in *Kotteakos* v. *U. S.*, 328 U. S. 750.

2. Whether the rights of the petitioner were substantially prejudiced when the trial court denied the motion of the defendants to direct the Government to produce a statement which a witness for the Government had previously given to government agents, in direct violation of this Court's decision in *Jencks* v. *U. S.*, 353 U. S. 657.

3. Whether the trial court committed prejudicial error in denying the petitioner's motion for a directed judgment at the end of the Government's case and at the end of the entire case in contradiction to the decision rendered in the case of *Ong Way Jong* v. *U. S.*, 245 F. 2d 392.

The Statutes Involved

Title 18, United States Code.

"Section 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not

exceed the maximum punishment proved for such misdemeanor."

Title 18, U. S. C.

"Sec. 3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then

direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which

is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

CONCISE STATEMENT OF THE CASE

The Government's Case

At the opening of the trial, the Government and the attorneys for the respective defendants, entered into a Stipulation which was then read into the record. The Stipulation indicated that there were three transactions in which the defendant Raymond Wool, was involved with various other defendants. The Quartermaster Corps awarded three contracts to Bonita Originals bearing contract numbers QM-28153, QM-28155, and QM-28102 (R. 71). These contracts, for the sake of clarity, will be referred to as the Bonita Contracts. At the time the contracts were awarded, they were handled by various other officers of the Quartermaster Corps. However, after September 12th, 1952, the defendant Raymond Wool, became the Successor Contracting Officer and was assigned the Bonita contracts for administration until they were completed.

On June 27th, 1952, R. & J. Garments was awarded a portion of the contracts referred to above, by a Captain Walker of the Quartermaster Corps (R. 72) and some time after September 12th, 1952, Captain Raymond Wool became the Successor Contracting Officer as to the portion handled by R. & J. Garments. Again for the sake of clarity, we will refer to this transaction as the R. & J. Garments contract.

A third transaction that involved the defendant Raymond Wool, will be referred to as the White Hat contract (R. 73).

The Government and defense counsel agreed that Captain Raymond Wool was a Contracting Officer from Sep-

tember 12th, 1952 until October 13th, 1953 (R. 89) at ASTAPA.

The record is completely devoid of any proof or testimony that the defendant Raymond Wool did anything improper in reference to the Bonita contracts. However, the Government's contention has been that Raymond Wool took a bribe in order to compel R. & J. Garments to assign its contract to Bonita (R. 544) and that he received a bribe of $5,000.00 in reference to the White Hat contract (R. 608, 612, 613).

The Government's Witnesses

The Government called to the witness stand, Thomas F. Rooney. He was called as an expert in the Procurement Division, who testified as to the functions of the various departments in the Government in purchasing supplies for Armed Services. His testimony indicated that a Contracting Officer is assigned in order to set the wheels in motion for the purchase of various items required by the Armed Services of the United States Government (R. 175, 179 and 273). Invitations to bid are sent out to various known manufacturers who are listed with the Government, to submit a bid on a particular item that they can manufacture. The manufacturer is supplied with a special envelope in which he seals his bid and mails to the mailing-room of the Quartermaster Corps at the time when it was doing its own purchasing, or to ASTAPA when it came into being. These sealed bids are received by a special mail room where the officer in charge of said mail-room places the sealed envelopes in a vault. The Contracting Officer sees the bids for the first time when the bids are opened in a room that is open to the public and in the presence of various officers and clerks and thereafter the bids are sent to a section known as Cost and Price Analysis. They analyze the bids to determine which is in fact the lowest bid and make their recommendations

to the Contracting Officer. In addition to analyzing the bids themselves, this section had accountants who specialized in evaluating the financial structure of a proposed bidder so as to determine whether the bidder was financially capable of completing the contract.

The next witness that was called by the Government was Melvin Carlin (R. 312, 313) who testified as an accountant for Bonita. He was present at a conversation where the defendants Rubin and Ades met with the witness Levy. The essence of his testimony was that Ades and Levy were doing business as a co-partnership under the firm name of Bonita Originals and that some time between April 15th and June 15th of 1952, Rubin proposed to the partners that he knew people at the Quartermaster Corps and that he would be able to obtain Government contracts for them to manufacture various items and that he would need certain moneys for expenses to return favors that might be extended to him at the Quartermaster Corps. The partners agreed to go along and on June 13th, 1952, a check was issued for $1,000.00 to Levy for which there was no entry in the books and the explanation was that Rubin took this money for expenses incurred at the Quartermaster Corps (R. 318). At this point, it should be noted that Captain Raymond Wool came into ASTAPA in September, 1952, some three months after this transaction.

The next witness was Mr. Leon M. Levy. His testimony described the meetings between Mr. Ades, Mr. Rubin, Mr. Carlin and himself, at which there were discussions in reference to Mr. Rubin's activities at the Quartermaster Corps. He indicated in his testimony that Mr. Rubin said he had connections at Quartermaster Corps and that he would require 5 or 7% of the contract in order to entertain and give gifts to people who helped him at the Quartermaster Corps (R. 412), and that he would receive a third of the profits reaped from the contract. He further testified that he kept Arabic notes of the various amounts

that Mr. Rubin took to give to certain personnel at the Quartermaster Corps (R. 439). He further testified that amongst these items, was an item for $200.00 to pay a doctor bill for services rendered to Captain Wool and that this payment was made because Captain Wool was helping Rubin get more work for Bonita. More specifically, Levy testified that Rubin told him that Captain Wool and the co-defendant Hort, were "squeezing" R. & J. Garments, in order to compel them to assign the unfinished portion of their contract to Bonita (R. 504, R. 544, R. 560-564). He further testified that Mrs. Hort told him that she and Wool worked hard to get R. & J. Garments to assign its contract to Bonita (R. 570).

Levy further testified that Rubin told him that in reference to the White Hat contract, Harry Lev gave Mrs. Wool $5,000.00.

The next witness that dealt with Captain Wool was Dr. Franklin. Dr. Franklin testified that he rendered medical services to Captain Wool and that his bill came to $265.00 (R. 1145). He further testified that he had no recollection of sending the bill to Captain Wool, nor did he have any recollection of the circumstances surrounding the sending of a bill, but that he was Mr. Rubin's family physician and that he took care of Mr. Rubin and various members of Mr. Rubin's family (R. 1147, 1148).

In order to tie in Captain Wool and the defendant Lev, on the White Hat contract, the Government produced John R. Nagy, who produced the records of the Hotel Biltmore, which indicated that Lev checked into the hotel on June 29th, 1953 and checked out on July 3rd, 1953 (R. 1194).

Another witness was Porreca, a co-defendant in the indictment, who pleaded guilty before trial and who testified that Rubin told him "Ray is one of the boys. What are you worried about?" (R. 1244).

The Government also produced a witness who testified that Lev withdrew $8,000,00 on June 26th, 1953 in Chicago (R. 1414).

Another witness that was called in reference to the White Hat contract was James T. Welsh, Jr., who testified that he was a Real Estate salesman and that about the end of March, 1953, Mrs. Wool was seeking to purchase a home (R. 1418). That in March of that year she paid $1,700,00 in April, $400.00, and the balance of $5,900.00 on August 1st at the closing of title (R. 1420, 1421, 1423).

Then the Government attorney introduced excerpts of testimony taken of Wool before a Senate hearing where he testified that he borrowed a total of $9,000,00 from Patsy Lucliano, and that he signed a note for him at the beginning of 1953 for $5,000.00 (R. 1483-1486). This was done over objection of counsel. Thereafter Patsy Lucliano was called to the witness stand by the Government who testified that he never had loaned that much money to Captain Wool, but there had been a series of loans of which he kept no record (R. 1492). On cross-examination he admitted being a race-track habitue, and that he was accustomed to winning and losing hundreds of dollars a day at the race-track (R. 1496).

Other Witnesses

The defendant did not call any witnesses nor did he take the stand and testify in his own behalf. However, certain witnesses were examined by the other defendants. At this point it becomes material to advert to the testimony that the Government adduced in order to prove Wool's participation in the conspiracy. In the Government's opening address, the Government attorney stated that he will prove that Patsy induced Wool to enter [illegible]

Harry Lev gave Mrs. Wool $5,000.00 so that he would be awarded the White Hat Contract (R. 42) and that Wool would grant deviations improperly to Harry Lev (R. 43). There was also an indication in the opening address that advance information was given to Lev by Wool and Hort so that he could underbid any other bidders. In a discussion that took place between defense counsel and the court, apparently the Government attorney withdrew from the position that Wool had any knowledge of what was contained in the sealed bids before they were opened in accordance with the regulations of the agency (R. 2652). Col. Zott was called to the stand by one of the other defendants who testified that he was in charge of the Inspection Department and that based on the pre-award survey, he would definitely have to recommend that the White Hat contract be awarded to Lev (R. 2663, R. 2664). In fact, the documents indicate that he did recommend the award to be made to Lev. He further testified that although the Contracting Officer did not have to take his recommendation, as a practical matter, he did (R. 2666). Col. Zott further pointed out that the procurement order for the white hats arrived at ASTAPA on April 8th, 1953, at 10:05 A. M. (R. 2711 Government's Exhibit 11B).

On the question of deviations granted to Lev, again Col. Zott's testimony indicated that nothing improper was done by Captain Wool. Lev sought a deviation whereby he would not have to "overpack" and would use the overseas [illegible] instead. Col. Zott indicated that in the Army, [illegible] never used overpacking but always packed, but that the Navy did use overpacking.

[illegible] witness that was called by one of the defendants was [illegible] Washington who was one of the principals of H & J Garments. He testified on behalf of how he came to get a Government contract that was awarded to H & J Garments. He testified that [illegible] (R. 3503, R. 3504) [illegible] as follows: He had been [illegible]

ture of various types of hats and had been awarded numerous contracts by various Contracting Officers in the Quartermaster Corps. There came a time when he bid against Bonita Originals on a contract and that Bonita Originals outbid him by approximately four cents per hat, and that Bonita Originals was awarded a portion of the contract and he was awarded the balance. At the time that the award was granted, he was having difficulties with meeting his schedules for the manufacturing of other hats pursuant to contracts that were awarded before the one in question. Therefore, his company decided that they would emphasize production on the older contracts first and go back to finish the last contract last. At this point, they had completed about 8 or 10 percent of the work. In February of 1953, several members of ASTAPA visited his plant; Mr. Zucker and Captain Martin, together with Captain Wool and Mrs. Hort. Captain Martin and Mr. Zucker were interested in the two older contracts. Captain Wool and Mrs. Hort were interested in the more recent contract. The purpose of the visit as described by Mr. Waldman was to reach some working arrangement as to meeting production schedules on the three contracts involved. After discussing the problem with his partners, they came to the conclusion that they couldn't possibly complete the last contract within any reasonable time, but that they could avoid a further default on the first two contracts if they could rid themselves of the third contract (R. 2559, R. 2560).

He then testified that he went to the Public Information Files in order to find out what companies were producing these caps for the Government and for what price, so that he could arrange subcontracting the third contract without having to pay a premium for doing so. He also considered the logic of the proposition that if he could make arrangements with a subcontractor who was known to the Government and was satisfactory to the Government, that he could obtain the approval of the Contracting

Officer to make such an assignment. At the Public Information Files he found that Bonita Originals was the logical choice for the sub-contracting of this work. Mr. Waldman then described how he sought out Bonita through Mr. Rubin whom he had met from time to time at bid openings at the Quartermaster Corps, and started negotiations with him. When he had reached an agreement with Mr. Rubin, he then approached Captain Raymond Wool as the Contracting Officer and Mrs. Hort for permission to sub-contract to Bonita Originals. Mr. Waldman was then asked directly whether he had been "squeezed" into a position to sub-contract to Bonita Originals and his answer was in the negative (R. 3573, R. 3574).

Basis of Federal Jurisdiction in the Court of First Instance

The basis of Federal Jurisdiction in the Court of first instance was that the crime charged was in violation of a Federal Statute, to wit: 18 U. S. C. §371.

Reasons Relied on for the Allowance of the Writ of Certiorari

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POINT I

The Trial Court committed prejudicial error by permitting the Government to prove several conspiracies under a count of the indictment that alleged a single conspiracy.

Under the first count of the indictment, it is alleged that "from on or about January 1st, 1951 and continuing up to and including the date of filing of this indictment" (March 22, 1956) the defendants, including Raymond Wool con-

spired with each other to defraud the United States Government in the administration and procurement of Government contracts.

The proof presented at the trial indicates that there were at least three separate and distinct conspiracies. The first conspiracy deals with contracts that were awarded to Bonita Originals by Quartermaster Corps. (R. 71); the second alleged conspiracy deals with the assignment made by R. & J. Garments to Bonita, and the third conspiracy deals with the White Hat contract.

The three conspiracies involve entirely different personnel as well as different organizations.

The first alleged conspiracy deals with a situation where the Government witness testified that the defendant, Rubin, met with the defendant, Ades, and the Government witness Levy at a time when Ades & Levy were partners conducting business under the name of Bonita Originals. It is alleged that the defendant, Rubin, proposed that he be accepted into the partnership on the basis that he had influence and contacts at Quartermaster Corps and could obtain contracts through his contacts. The defendant, Wool, was not assigned to Quartermaster Corps nor was there any testimony presented that he had in any fashion participated in the three contracts originally obtained by Rubin from Quartermaster Corps. The persons involved in this transaction were, Rubin, Ades, Major Farnell, David Pollack, Mella Hort and Leon Levy.

As to this first conspiracy there was testimony that David Pollack received $500.00 in cash; Major Farnell received $1,000.00 and that Mella Hort received several hundred dollars.

The second conspiracy dealt with an assignment of a contract from R. & J. Garments to Bonita Originals. The testimony in regard to this transaction deals with the defendants, Ades, Rubin, Hort and Wool and the Government witness Leon Levy. As to this transaction it was

alleged that Wool had a medical bill paid by Bonita for his effort in helping Bonita obtain the assignment of a Government contract from R. & J. Garments.

The third conspiracy involved the White Hat contract and dealt with Harry Levy, Marvin Rubin, Maurice Ades, Joseph Porecca, Raymond Wool and Melba Hort.

Each of these transactions were separate and distinct from the other and dealt with different people except that Marvin Rubin and Maurice Ades are referred to in all of the transactions.

Such lumping together of conspiracies was condemned by the United States Supreme Court in *Kotteakos v. U. S.*, 328 U. S. 750, where the court held that it was improper to charge one conspiracy and proceed to prove multiple conspiracies merely because there was a common thread among them. The court pointed out the hazard of having a jury follow the proceedings and examine clearly the guilt or innocence of each of the defendants when confronted with a mass of transactions dealing with an assortment of conspiracies. Again and again, defense counsel in the instant case pointed out the hazards of having the proof of one conspiracy spilling over in various directions on various defendants, whether they were or were not involved in a specific conspiracy.

A further inflation of the confusion that was created by lumping the conspiracies together appears in an incident that took place during the course of the trial beginning with page 482 of the record. Levy had been testifying that Rubin told him to withdraw cash checks and to put the cash aside in a safe so that it would be available for gifts and entertainment to take care of various persons at Oppenheimer Hotels. As each such check was produced, objection was taken by defense counsel for Wool and the trial court sustained the objection. When Exhibit 41 was introduced in evidence by the Government to show that a check for $5000 was

cashed for this purpose (R. 489), the defendant Wool raised the same objection. This time, however, the court overruled the objection and said nothing about taking the exhibit subject to connection. Then we find at page 496 of the record, that the $350.00 check that was objected to previously, was part of a fund that totalled $600.00 and was distributed amongst Major Farnell, Pollack and Hort. As long as these exhibits were being accepted subject to connection, and the jury was advised that it was accepted subject to connection, we can assume that up to that point the court was in agreement with counsel that Wool was in no way connected with the first conspiracy. However, when the $350.00 check was accepted in evidence over objection of defense counsel, the jury had the right to assume that this check was tied in with Wool. The fact that at a later point the Government showed through its own witness where the money was supposed to have gone and that Wool was not a participant, was insufficient to wipe out the wrong impression that the jury got as to Wool's participation in the first conspiracy. This could only have occurred because the Government was permitted to prove a hodge-podge of conspiracies under the cloak of proving one conspiracy.

The Court of Appeals in the instant case recognized the problem that exists in distinguishing between single and multiple conspiracy situations.

It is respectfully submitted that the Court of Appeals has not helped in solving the problem. In its decision the Court of Appeals for the Second Circuit states at page 31 hereof, "Here, although from Lev's vantage point the Bonita transaction was completely separate from the White Hat Transaction, from the viewpoint of the other appellants the conspiracy was a single one to defraud the Government in matters of war contracts. Thus as to Rubin, Ades and Wool, who were involved in both transactions, there is, properly speaking, no variance."

If we are dealing with a conspiracy to defraud the Government in matters of war contracts, then logically speaking, every contract in which Ades and Rubin were interested would be part and parcel of one conspiracy in which different co-conspirators joined or abandoned from time to time. Such reasoning negates the statement that there were two separate transactions. Obviously, the defendant Wool had nothing to do with the contracts that were originally obtained by Bonita Originals any more than the defendant Lev.

It is respectfully submitted that this Court should define single and multiple conspiracies, so that the lower courts can be guided thereby.

POINT II

The rights of the petitioner were substantially prejudiced when the Trial Court denied the motion of the defendants to direct the Government to produce a statement which a witness for the Government had previously given to Government agents.

The Court of Appeals for the Second Circuit in the instant case stated as follows, page 34 hereof: "Since the decision in Jencks v. United States, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony." The decision then proceeds to state that the trial court's error was rendered harmless.

The reference is being made to a demand that was made by defense counsel for a statement of the witness Carlin. Carlin was called to the witness stand at the very inception of the trial. His testimony dealt in the main with a meeting that was held at the office of Bonita Originals wherein Levy, Ades, Rubin and Carlin were the sole per-

sons present. His testimony dealt with the presentation of a plan made by the defendant, Rubin, whereby he offered to obtain government contracts through his associations and contacts at the Quartermaster Corps and represented that he would require certain sums of money in order to induce government personnel to treat him favorably.

Carlin's testimony presented the basic picture for future dealings in the alleged conspiracy. The details, however, of various transactions that took place as a result of this meeting was testified to by the witness Levy. The Court of Appeals in reviewing the instant case refers to Levy's testimony as "terribly devastating testimony." The witness Levy followed the witness Carlin to the witness stand. Therefore when defense counsel made a motion for an order directing the Government to supply the defense with the written record of Carlin's interview by government officers and that motion was denied on the grounds that the defendant has failed to prove prior inconsistent statements, this became the law of the case and defense counsel were bound thereby. Similar motions would have been made in reference to Levy's testimony as well as other witnesses if it were not for the trial court's ruling on the application for Carlin's statement. So that even if we were to agree with the Court of Appeals that at a new trial, defense counsel would not be entitled to examine a summary made of Carlin's statement, the trial court's error seriously prejudiced the defense as to applications for statements that would be made as to witnesses following Carlin to the witness stand.

The petitioner herein respectfully contends that even under the Statute referred to in the opinion of the Court of Appeals, 18 U. S. C. Section 3500 (e)(1) (2), the defense would be entitled to the summary. The section reads that the witness' statement must be recorded "contemporaneously" and this has been interpreted by the

Court of Appeals to mean "simultaneously". It is respectfully submitted that there is nothing in the *Jencks* Decision nor in the Statute to indicate how soon a statement must be recorded after given by the witness. It is necessary to have a Supreme Court ruling on this issue so that the courts below may be guided thereby.

POINT III

The rights of the Petitioner were substantially prejudiced by the Trial Court's refusal to direct judgment for the Petitioner both at the end of the Government's case and at the end of the entire case.

It is respectfully submitted that the Government relied very heavily upon the testimony of the witness Levy to connect the defendant Raymond Wool with any conspiracy. Levy testified that the defendant Rubin told him and others that he had connections at Quartermaster Corps who would help him obtain Government contracts (R. 412). Levy again testified that he issued a check to Dr. Franklin on the representation made by Mr. Rubin that Captain Wool was helping their firm (R. 543, 544). In fact, everything that Levy testified to as to what took place at Quartermaster Corps or at ASTAPA, which succeeded Quartermaster Corps, is summarized in Levy's cross-examination at page 671 of the Record.

> "Q. About the bribing of Government officials; did you ever make a complaint to anybody about that? A. I never did make a complaint to anybody about this because I cannot prove these things, only what Mr. Rubin telling me."

All of Mr. Levy's testimony dealing with his Arabic notes are based on statements made to him by Rubin (R. 1016, 1017).

As to each of the contracts in which the Government contends Captain Wool participated as a co-conspirator, there is only the testimony of Levy that Rubin told him that Captain Wool accepted moneys or favors for these contracts.

In reference to the R. & J. Garments assignment, it was Rubin, according to Levy's testimony, who stated that Captain Wool's doctor bills should be paid by Bonita so that R. & J. would be "squeezed" into a position to assign the contract to Bonita (R. 544, 543).

Again in reference to the White Hat contract, Levy testified that Rubin told him that Lev had given Mrs. Wool $5,000.00 for assisting Lev in obtaining the White Hat contract (R. 611, 612). At another point, Levy testified that Mrs. Hort told him how she and Captain Wool worked hard to get R. & J. Garments to assign its contracts to Bonita (R. 570).

The court's attention is drawn to the fact that in every one of these conversations, Captain Wool was not present.

It has been a well-established rule of law that before the declarations of co-conspirators can be received in evidence against one charged with participation in a conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was made a party to it at the time the declarations were made. *Nibbelink* v. *U. S.*, 66 F. 2nd 178, 179.

> "* * * A defendant's connection with a conspiracy cannot be established by the extra-judicial declarations of a co-conspirator, made out of the presence of the defendant. There must be proof aliunde of the existence of the conspiracy, and of the defendant's connection with it before such statements become admissible as against a defendant not present when they were made." Montford v. U. S., C. A. 1952, 200 F. 2d 759, 760. To the same effect, see Fowler v. U. S., C. A. 1957, 242 F. 2d 860.

It should be pointed out that the petitioner herein does not at this point argue that there was insufficient proof of a conspiracy; he does argue that his complicity with the conspiracy was not proved sufficiently to warrant having the case go to the jury.

The Government has argued that the circumstantial evidence presented against Captain Wool was sufficient to connect him up with the conspiracy and that once he is so connected with the conspiracy all statements, made by co-conspirators can be used against him.

The petitioner does not argue with the law but does argue that the tests created by the various decisions have not been met. What circumstantial evidence does the Government argue connects the defendant Raymond Wool with the conspiracy?

1. Captain Raymond Wool's name appears on the documents approving the assignment of contract from R. & J. Garments to Bonita.

2. Captain Raymond Wool was the Successor Contracting Officer on the Bonita contracts.

3. Captain Raymond Wool knew and associated with Rubin.

4. Bonita paid Captain Wool's medical bill in the sum of $265.00.

5. Captain Wool and other officers appeared at the premises of R. & J. Garments in reference to their Government contracts.

6. Captain Wool was the Contracting Officer who was assigned the White Hat contract.

7. Captain Wool signed the documents awarding the White Hat contract to Lev.

8. Captain Wool signed documents in reference to deviations granted to Harry Lev.

9. Captain Wool bought a home for which cash was paid.

10. Captain Wool, in a sworn statement to the Senate, said he signed a note for various moneys borrowed from Luciano; Luciano denies receiving the note and denies lending large sums of moneys to Captain Wool, but admits lending small sums of moneys from time to time to Captain Wool.

This collection of circumstantial evidence falls in line with *Shannabarger* v. *U. S.*, 99 F. 2d 957, where the Court held at page 961 of the opinion:

> "It is a settled rule of law that 'In conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged.' The agreement must, therefore be established before a conviction can be sustained. Tingle v. U. S., 8 Cir., 38 F. 2d 573, 575. The agreement, however, is a fact which, like most other disputed facts, may be proven by circumstantial evidence. Where the Government relies upon circumstantial evidence to establish the conspiracy, the circumstances must be such as to warrant the jury in finding that the conspirators had some unity of purpose, some common design and undertaking, some meeting of minds in an unlawful arrangement and the doing of some overt act to affect its object. See Marx v. U. S., 8 Cir., 86 F. 2d 245, 250, and cases there cited. Further, the

> circumstances relied upon must be not only consistent with the guilt of defendants, but must be inconsistent with their innocence."

Before we apply the tests required to the circumstantial evidence presented, we must also bear in mind the admonition of the United States Supreme Court in the case of *Direct Sales Co.* v. *U. S.*, 319 U. S. 703, which held that a conspiracy is not made out by piling an inference on an inference.

In examining each item of circumstantial evidence that has been presented in order to tie in Captain Wool with a conspiracy, it falls far short of meeting the tests required by the cases cited above.

The record, both by way of testimony and documentary proof, is replete with a series of acts on the part of Wool that is just as consistent with innocence as with guilt. As a Captain in the Armed Services of the United States, Wool was assigned to ASTAPA. As such an officer, he was assigned the duty of being a Contracting Officer; as a Contracting Officer, it was his duty to award contracts to the lowest bidder as recommended by other agencies. The Government does not deny that in each instance where Captain Wool signed a document as a Contracting Officer or Successor Contracting Officer, he followed to the letter, the recommendations of the various agencies whose recommendations he was duty-bound to follow.

When R. & J. Garments was delinquent in its schedules and commitments under various Government contracts, it was his duty to find out what could be done about the delinquencies and what steps should be taken to get the contracts completed in accordance with its terms. When he went to visit R. & J. Garments, he did not go in secret, but went along with other officers and members of the same office. The persons who went on that visit were, like himself, interested in protecting the contractual rights of the

United States Government. The other officers were interested in two older contracts and he was interested in a more recent contract. The only shred of evidence that makes it appear that Captain Wool had a sinister motive for the visit is Levy's hearsay testimony of what Rubin told him the purpose was for the visit.

The fact that Rubin and Captain Wool were closely associated where Captain Wool entertained Rubin and Rubin entertained Captain Wool and even went a step further in suggesting to Captain Wool that he avail himself of Rubin's personal physician, follows in line with the Court's opinion as stated in *Ong Way Jong* v. *U. S.*, C. A. 1957, 245 F. 2d, 392 at page 394.

> "No evidence has been adduced which definitely proves that Ong was here engaged in any criminal activity. No one has directly testified to such a connection or any circumstance from which such an accessoryship could be legally inferred. Guilt by association would be the only basis. Ong was constantly with Wee. Wee sold narcotics. Therefore, Ong must have supplied the heroin. This is a classic non sequitur."

So in the instant case, because there was proof presented that Rubin was engaged in a conspiracy with Levy and others and since there was a close association between Rubin and Wool, we are asked to assume that Wool participated in the conspiracy. The classic *non sequitur!* See also *U. S.* v. *Di Re*, 332 U. S. 581; *U. S.* v. *Moloney*, C. A. 1952, 200 F. 2d 344.

Another circumstance that the Government claims ties Wool in with the conspiracy is the purchase of his home for cash.

Obviously the purchase of a home in and of itself is an innocent act. The Government contends that it is proof

of the fact that Wool received $5,000.00 from Harry Lev. This item is allegedly tied in, in the following fashion; Levy testified that Rubin told him that some time towards the end of June of 1953, Harry Lev met with Rubin, Captain Wool and Mrs. Wool, at which time Harry Lev gave Mrs. Wool $5,000.00 as part payment for helping Harry Lev get the White Hat contract. To prove this transaction, the Government presented testimony that Lev withdrew $8,000.00 on June 26th, 1953 (R. 1414) and that Lev checked into the Hotel Biltmore on June 29th, 1953 (R. 119[illegible]). There was a Government witness, Welsh, who testified on the Government's behalf that in March of 1953, Mrs. Wool signed a binder on a house and paid $1,700.00 cash (R. 1421). That in April, she paid an additional $400.00 cash, at which time contract was signed, and that in August of 1953, she paid $5,900.00 in cash on the closing of title (R. 1420). In connection with these items, it should be pointed out that Government's Exhibit 11B was a procurement order for white hats which arrived at ASTAPA on April 8th, 1953 at 10:05 (R. 2711). This procurement order was then assigned by Wool's superiors to a Contracting Officer. Such a Contracting Officer could be Captain Wool or any of several others.

We must, therefore, reason that Captain Wool or Mrs. Wool had a crystal ball in March of 1953 whereby they could prophesy that a procurement order would come in on April 8th; that Captain Wool would be assigned as Contracting Officer; that Harry Lev would be interested in obtaining such a contract; that the section of Cost and Price Analysis and the section of Inspection would approve Harry Lev as the lowest responsible bidder. If Captain Wool had the ability to foresee all of these items, then he could go out and contract for the purchase of a home based on income from a bribe. It is respectfully submitted that this is the wildest kind of conjecture and guessing that a jury is asked to indulge in.

The consciousness of guilt theory has its place in the law provided there is substantial proof that conflicting statements were made by the defendant. Certainly it was never intended to apply where a conflict in statement is testified to by an irresponsible witness. The witness, Luciano, agreed that he did make loans to the defendant, Wool, but denied that he made them in the size in which Wool claimed before the Senate. To convict a man on the testimony of a Luciano which only partly contradicts the defendant's statement to the Senate would give rise to a very serious miscarriage of justice. Especially is this true since the defendant did not take the witness stand and the conflicting statement is attributed to him under different circumstances and in an entirely different forum from the courts. As was held in *Bell* v. *U. S.*, C. C. A. 1924, 2 F. 2d 543, "Proof of the overt acts alone would not warrant a conviction for conspiracy. That would require not only proof of the overt acts charged, or one of them but proof of the unlawful agreement. * * * " And to go a step further, there must be proof, circumstantial or direct, or both, that the person charged had knowledge of the existence of the conspiracy and with that knowledge intentionally did some act or thing to further carry it on. *Duke* v. *U. S.*, C. A. 1956, 233 F. 2d 897.

In the case at bar, the Government sought to prove various overt acts committed by the defendant and asked the jury to draw the inference from these acts that he knew of the conspiracy and was a party to the conspiracy. Can it be denied that the Government relied upon Levy's hearsay testimony to tie in Wool with the conspiracy?

We therefore come to this conclusion that from the overt acts we must draw the inference that Wool committed these acts in furtherance of a conspiracy and from that inference we must draw the further inference that he participated in the conspiracy knowingly. It has been

pointed out in *U. S.* v. *Falcone*, 311 U. S. 205, that the mere fact that one does acts in furtherance of a conspiracy is not proof that he knew of the conspiracy or that he furthered the conspiracy knowingly. See also *Duke* v. *U. S.*, C. A. 1956, 233 F. 2d 897.

The various courts of the United States have repeatedly held that if the evidence in a criminal case as a whole is as consistent with innocence as with guilt, a conviction should not be sustained and that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused. *Tinsley* v. *U. S.*, 43 F. 2d 890 and cases cited.

As was said in *Ong Way Jong* v. *U. S.*, 245 F. 2d 392, 395:

> "The excellent trial judge made the mistake of considering a mass of evidence which was only admissible against Wee."

To paraphrase, the excellent trial judge made the mistake of considering a mass of evidence which was only admissible against Rubin.

CONCLUSION

The petition for certiorari should be granted and this Court in the exercise of its powers should order the judgment of conviction herein reversed.

Respectfully submitted,

ALBERT H. TREIMAN
Attorney for Petitioner
Office & P. O. Address
261 Broadway
New York 7, New York

Exhibit "A"

OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 283—October Term, 1957.

(Argued April 29, 1958 Decided August 11, 1958.)

Docket No. 24809

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRY LEV, MARVIN RUBIN, MAURICE ADES and RAYMOND WOOL,

Defendants-Appellants.

Before:

CLARK, *Chief Judge,*
and HINCKS and STEWART, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge.*

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from their convictions of conspiracy to defraud the United States, 18 U. S. C. §371, and Rubin also appeals from his conviction of bribery, 18 U. S. C. §201. Affirmed.

ARTHUR H. CHRISTY, Chief Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and Fioravante G. Perrotta and Joseph T. Altier, Asst. U. S. Attys., New York City, on the brief), *for appellee.*

MILTON S. GOULD, of Gallop, Climenko & Gould, New York City (George Trosk, of Gallop, Climenko & Gould, New York City, on the brief), *for defendant-appellant Harry Lev.*

JOHN T. SULLIVAN, New York City, *for defendant-appellant Marvin Rubin.*

THOMAS J. SHORT, of Dougherty, Ryan & Mahoney, New York City, *for defendant-appellant Maurice Ades.*

ALBERT H. TREIMAN, New York City, *for defendant-appellant Raymond Wool.*

CLARK, *Chief Judge*:

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from a verdict and judgment of conviction for conspiracy to defraud the Government in violation of 18 U. S. C. §371. Rubin also appeals from a conviction for bribery in violation of 18 U. S. C. §201. The defendants were indicted for a single conspiracy to defraud the United States in the administration and procurement of Government contracts. Alleged errors involve, principally a claimed variance between a charge of a single conspiracy and proof of two, and a failure to order a statement from a Government witness delivered to the defense for use in cross-examination. Ades and Wool also claim an insufficiency of the evidence, as does Rubin with respect to the bribery charge.

The proof adduced at the trial below tended to show overt acts between February 1952 and about August 1953 involving the procurement and administration of two contracts awarded to Bonita Originals, Inc., for the manufacture of Army garrison caps, and overt acts in the period commencing in April 1953 and continuing on into 1954 involving the procurement and administration of a contract awarded to Spencer Manufacturing Corporation for the manufacture of white hats for the Navy. During the former period Ades was the president and owner of 50 per cent of the stock of Bonita, Rubin was employed by Bonita on a profit-sharing basis to deal with Government officials on the garrison cap transaction, and Wool, an Army officer in the Quartermaster Corps, was assigned the Bonita contracts for administration until they were completed. Lev was not involved in either the procurement or the administration of the Bonita contracts. But Lev, Ades, and Rubin were all interested in Spencer Manufacturing Corporation and involved in the procurement and administration of the white hat contract. Wool was appointed a Contracting Officer of the Armed Services Textile and Apparel Procurement Agency (ASTAPA) prior to the award of the white hat contract and participated in both the award and the administration of that contract. On this proof Judge Kaufman, for the defendants' benefit, charged the jury that in fact two separate conspiracies were involved—the Bonita conspiracy and the white hat conspiracy—although he expressed doubts as to whether it was improper to characterize the conspiracy as a single one.

Defendants urge that a fatal variance occurred between the indictment and the proof concerning the number of conspiracies, and that this error was compounded by confusion on this point in the court's charge to the jury. A claim of variance is not unusual in a conspiracy case, *United States* v. *Rosenberg*, 2 Cir., 150 F. 2d 788, 793, certiorari denied 326 U. S. 752, and the courts have not evolved clear lines

for distinguishing single and multiple conspiracy situations. Cf. *Blumenthal* v. *United States*, 332 U. S. 539; *Berger* v. *United States*, 295 U. S. 78; *Kotteakos* v. *United States*, 328 U. S. 750; *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, certiorari denied *Cohen* v. *United States*, 323 U. S. 799; *Monroe* v. *United States*, D. C. Cir., 234 F. 2d 49, certiorari denied 352 U. S. 873; *Canella* v. *United States*, 9 Cir., 157 F. 2d 470. Here, although from Lev's vantage point the Bonita transaction was completely separate from the white hat transaction, from the viewpoint of the other appellants the conspiracy was a single one to defraud the Government in matters of war contracts. Thus as to Rubin, Ades, and Wool, who were involved in both transactions, there is, properly speaking, no variance. See *Canella* v. *United States*, *supra*, 9 Cir., 157 F. 2d 470; *cf. Blumenthal* v. *United States*, *supra*, 332 U. S. 539.

As Lev was involved only in the latter transaction, a more serious question of variance does arise as to him. In *Berger* v. *United States*, *supra*, 295 U. S. 78, 82, and *Kotteakos* v. *United States*, *supra*, 328 U. S. 750, 757, the Supreme Court set out the applicable rule in these circumstances: "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'effect the substantial rights' of the accused." In this Circuit the test applied has been stated as whether the conspiracies ultimately proved might have been joined in a single indictment and whether the trial was conducted so as to protect the rights of defendants who are not common to all conspiracies. *United States* v. *Cohen*, *supra*, 2 Cir., 145 F. 2d 82, 89. Although Lev claims that the confusion inherent in the indictment was compounded by the court's instructions, a thorough reading of the charge shows that Judge Kaufman was scrupulous in protecting Lev's rights. In fact it is apparent that the jury was able to differentiate between the evidence relevant to defendants involved in only one of the con-

spiracies, for it acquitted defendant Pollack, who was alleged to be involved solely in the Bonita affair. It follows that the variance here was not prejudicial and was at most harmless error.

Ades and Wool claim that the evidence linking them to the conspiracy was insufficient to justify admitting in evidence against them the admissions of other conspirators. Two witnesses for the prosecution gave important evidence involving particularly statements by Rubin defining and particularizing the use of funds to pay for entertainment of and gifts to the Government inspectors. These were Carlin, accountant for Bonita, and Levy, secretary-treasurer and co-owner of Bonita. Levy's testimony particularly went into details of funds drawn by him for uses which Rubin's directions and explanations to him showed were improper, definitely bringing the others, notably Ades and Wool, into the conspiracy. Hence we must consider the independent evidence supporting the inference of participation in the conspiracy and justifying the receipt of this testimony against them.

The independent evidence linking Ades to the illegal plot shows that he was present at a meeting with Rubin in the spring of 1952 where Rubin allegedly stated that he would need 5 to 7 per cent of the contract price in order to entertain Government personnel. Ades then went to Puerto Rico, where he managed the factory which manufactured the caps and hats supplied the Government. There is testimony that, while running the plant in Puerto Rico, he induced a Government inspector, Ienni, to live at his apartment rent free; that he brought another Government employee named Schlesinger to Puerto Rico secretly under an alias; that he attempted to bribe another inspector, Watkins; that he wrote a letter attempting to have Forcillo, a Government inspector, removed because he was too tough; and that, even before the white hat contract was awarded, he was bragging that they would receive it.

As to Captain Wool, the proof was that he went to visit Rubin's office several times; that as the officer supervising the procurement he granted valuable contractual deviations whenever they were requested, both in the Bonita contract and later to Lev; that he had several meetings with Lev before the opening of the bid on the white hat contract; and that as contracting officer he approved Lev's bid, although the pre-award survey showed that Lev had no machinery at all in Puerto Rico to manufacture the hats. There was testimony that in May or June 1953 Wool came to the Bonita office and took a topcoat and again, some children's dresses. There was further evidence from Rubin's doctor, Dr. Franklin, who testified that Rubin introduced Wool to him and that he treated Wool on nine separate office visits and rendered a bill for $265, which was paid by a check from the Bonita Corporation for $285 (thus including $20 for Rubin himself). Later when Rubin came to testify he said that Wool's affliction was deep-seated and of long standing, which no Army doctor had been able to reach, but which Dr. Franklin proceeded to cure by this course of treatment. This evidence stands uncontradicted on the record, and Wool (who did not testify) offered no satisfactory explanation of Bonita's making this payment for him. There was also considerable circumstantial evidence tending to show, when coupled with testimony as to statements made by an alleged coconspirator, that a month after the white hat contract was awarded Lev advanced him $5,000, which he used to complete payments on the purchase of a house. Later in testifying to a Senate committee investigating these frauds he claimed to have borrowed money and given a note to one Luciano, who denied this in testifying below. This testimony was presented by the Government to show consciousness of guilt. Thus the evidence offered as to both Ades and Wool presents amply sufficient groundwork for the admission of testimony of statements by coconspirators and in particular for Levy's terribly devastating testimony, which, when believed by the jury, left no question of guilt.

Defendants Lev and Rubin assert that the trial court committed reversible error in refusing to order the Government to produce for their inspection a statement made by Government witness Carlin to agents of a Senate investigating committee. Since the decision in *Jencks* v. *United States*, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony. But before a new trial is to be ordered, we must see if the statement is in any event discoverable. Although the statement is not a part of the lower court record, the prosecutor—who did not have it at the trial—has procured from the Senate committee and presented to us in a sealed envelope a verified copy of a Senate investigator's summary of an interview with Carlin. An additional affidavit establishes that this summary is the only written record made of Carlin's interview, and that it was written following the interview and is not a substantially verbatim record of Carlin's statement. We have examined the summary, and internal evidence from it tends also to bear this out.

While defendants may perhaps have been given a right to inspect a statement of this nature by the *Jencks* decision, *supra*, 353 U. S. 657, 668,[1] the recent codification of discovery in this situation allows a defendant to examine only the following:

> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

[1] Here the Court said: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial." While not specified, it seems inferable that the F. B. I. recording of the reports made orally was contemporaneous with the making of the oral statements.

> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U. S. C. §3500(e)(1)(2).

As this statute will apply on a new trial of any of these defendants, and as under it discovery of the summary cannot be required, the trial court's error is rendered harmless, *United States* v. *Miller*, 2 Cir., 248 F. 2d 163, certiorari denied *Miller* v. *United States*, 355 U. S. 905.

There remains to be discussed Rubin's contention that there was insufficient evidence for the jury to have convicted him of bribery. We think the evidence quite sufficient. There was proof that Chief Inspector Porreca, whose duty it was to assign inspectors, upon a request had removed Forcillo from Puerto Rico and replaced him with a more lenient man. Thereafter Rubin sent Porreca a deep freeze, for which Bonita paid. Porreca later received some meat to put in the freezer. He testified that he never paid for any of this, nor was he ever asked to pay for it. This was enough evidence of violation of the bribery statute, 18 U. S. C. §201. The defense efforts to show that nothing Porreca did actually defrauded the Government are irrelevant as the statute shows.

This important trial discloses a sad and sordid picture of Government agents yielding to rather cheap temptation, some willingly, some only under pressure. But there is another side to the story, of inspectors who stood out at all times against such debauchery of their obligations and who were transferred to other activities for their pains. It is to be hoped that they received no permanent setbacks in their careers, but eventually were accorded that proper respect which they so richly merited.

Convictions affirmed.

Exhibit "B"

INDICTMENT

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C-149-324

UNITED STATES OF AMERICA,

—v—

HARRY LEV, MARVIN RUBIN, MAURICE ADES, JOSEPH G. PORRECA, ERIC C. FARNELL, RAYMOND WOOL, MELLA HORT, DAVID POLLACK and GEORGE A. EARNSHAW,

Defendants.

The Grand Jury charges:

1. From on or about January 1, 1951, and continuing up to and including the date of filing of this indictment in the Southern District of New York, Harry Lev, Marvin Rubin, Maurice Ades, Joseph G. Porreca, Eric C. Farnell, Raymond Wool, Mella Hort, David Pollack and George A. Earnshaw, the defendants, did unlawfully, wilfully and knowing combine, conspire, confederate and agree together, and with each other and with divers other persons to the Grand Jurors unknown, to defraud the United States in the exercise of its governmental functions of administration and procurement of government contracts free from unlawful impairment, obstruction, partiality, improper influence, dishonesty, fraud and corruption, and

in its right and interest in the conscientious, honest and faithful services, judgments, determinations and actions of the defendants Joseph G. Porreca, Eric C. Farnell, Raymond Wool, Mella Hort, David Pollack and George A. Earnshaw, and duly appointed employees of agencies of the United States, to wit, the New York Quartermaster Procurement Agency (hereinafter referred to as the NYQMPA), and the Armed Services Textile and Apparel Procurement Agency (hereinafter referred to as the ASTAPA), free from corruption, partiality, improper influence, dishonesty, bias, hope of unlawful reward and fraud.

2. During the course of the conspiracy defendant Joseph G. Porreca was a Clothing Inspector and Chief Inspector of the Textile Fabrication Branch of the NYQMPA.

3. During the course of the conspiracy defendant Eric C. Farnell was a Contracting Officer in the NYQMPA, and Chief of the Clothing Purchasing Branch of the ASTAPA.

4. During the course of the conspiracy defendant Raymond Wool was Chief of the Headwear, Knitwear, Rainwear Section, Clothing Purchasing Branch, Purchasing Division of the ASTAPA.

5. During the course of the conspiracy defendant Mella Hort was a Procurement Clerk in the NYQMPA, and a Contract Administration Clerk in the ASTAPA.

6. During the course of the conspiracy defendant David Pollack was a Business Accountant in the NYQMPA and in the ASTAPA.

7. During the course of the conspiracy defendant George A. Earnshaw was a Purchasing Agent for the NYQMPA and the ASTAPA.

8. It was part of the conspiracy that the defendants Harry Lev, Marvin Rubin and Maurice Ades would offer to give and give money and other things of value to officers, employees and persons acting for and on behalf of the NYQMPA and the ASTAPA, for the purpose of inducing them to corruptly disclose confidential information prior to the awarding of government contracts, which information would enable said defendants to be low bidders on such contracts.

9. It was further a part of the conspiracy that the defendants Harry Lev, Marvin Rubin and Maurice Ades would offer to give and give money and other things of value to officers, employees and persons acting for and on behalf of the NYQMPA and the ASTAPA for the purpose of inducing them to corruptly grant deviations in the specifications of government contracts, which deviations might result in loss of moneys to the United States.

10. It was further a part of the conspiracy that the defendants would offer to give and give money and other things of value to clothing inspectors employed by the NYQMPA for the purpose of influencing their decisions and actions on matters pending before the said clothing inspectors in their official capacities as inspectors of clothing and apparel for the United States Army, Navy and Air Force.

11. It was further a part of the conspiracy that defendants Joseph G. Porreca, Eric C. Farnell, Raymond Wool, Mella Hort, David Pollack, George A. Earnshaw, and other co-conspirators to the Grand Jurors unknown, in their capacities as officers, employees and persons acting for and on behalf of the NYQMPA and the ASTAPA would corruptly accept moneys, gratuities and other things of value with intent to have their decisions and actions influenced thereby on matters and contracts pend-

ing before them in their official capacities within the said agencies of the United States.

12. It was further a part of the conspiracy that the defendants and other co-conspirators to the Grand Jurors unknown, would at all times misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the purposes of, and the acts done in furtherance of said conspiracy.

OVERT ACTS

The Grand Jury further charges that the defendants and co-conspirators to the Grand Jurors unknown, in furtherance of and for the purpose of carrying into execution said combination, conspiracy, confederation and agreement, did and performed the following and other overt acts, to wit:

1. In or about March 1952, in the Southern District of New York, defendant Marvin Rubin stated and represented to Leon Levy and defendant Maurice Ades that he had connections and influence with officers, employees and persons acting for and on behalf of the NYQMPA, and that he could obtain for the said Leon Levy and Maurice Ades, special advantages and preferential treatment in the awarding and administration of government contracts.

2. In or about May 1952, in Chicago, Illinois, defendant Harry Lev offered to pay $50 a week to Michael Weintraub when the said Michael Weintraub was then and there acting as an Inspector for and on behalf of the NYQMPA.

3. On or about June 13, 1952, in the Southern District of New York, defendant Marvin Rubin delivered and caused to be delivered to defendant Eric C. Farnell the sum of $1,000 in United States currency.

4. On or about August 27, 1952, in the Southern District of New York, defendant Marvin Rubin delivered and caused to be delivered to defendant David Pollack the sum of $500 in United States currency.

5. On or about December 24, 1952, in the Southern District of New York, defendant Marvin Rubin delivered and caused to be delivered to defendant Joseph G. Porreca a nine cubic foot deep freeze unit.

6. On or about October 14, 1952, in the Southern District of New York, defendants Marvin Rubin and Joseph G. Porreca caused Inspector William Ienni to be transferred to Mayaguez, Puerto Rico.

7. On or about December 22, 1952, in the Southern District of New York, defendant Marvin Rubin delivered and caused to be delivered to defendant George A. Earnshaw a quantity of whiskey of the approximate value of $17.55.

8. On or about May 12, 1953 in San Juan, Puerto Rico, defendants Harry Lev, Marvin Rubin and Maurice Ades held a meeting with Inspector Louis I. Alperstein.

9. On or about June 11, 1953, in the Southern District of New York, the defendant Marvin Rubin caused a check for $285 to be delivered to William D. Franklin in payment of medical expenses incurred by defendant Raymond Wool.

10. On or about August 12, 1953, in the Southern District of New York, defendant Marvin Rubin delivered and caused to be delivered to Jerome Schlessinger, a plane ticket to Puerto Rico and the sum of $50 in United States currency.

(Title 18, United States Code, Section 371).

SECOND COUNT

The Grand Jury further charges:

On or about August 27, 1952, in the Southern District of New York, Marvin Rubin, defendant herein, promised, offered to give and gave the sum of $500 in United States currency to David Pollack, the said David Pollack being then and there an employee of and a person acting for and on behalf of an agency of the United States, to wit, the New York Quartermaster Procurement Agency, with intent to influence the decision and actions of the said David Pollack on matters at that time pending, and which might by law be brought before him in his official capacity as a Business Accountant in the New York Quartermaster Procurement Agency.

(Title 18, United States Code, Section 201).

THIRD COUNT

The Grand Jury further charges:

On or about December 24, 1952, in the Southern District of New York, Marvin Rubin, defendant herein, promised, offered to give and gave a nine cubic foot deep freeze unit to Joseph G. Porreca, the said Joseph G. Porreca being then and there an employee of and a person acting for and on behalf of an agency of the United States, to wit, the New York Quartermaster Procurement Agency, with intent to influence the decisions and actions of the said Joseph G. Porreca on matters at that time pending and which might by law be brought before him in his official capacity as a Clothing Inspector in the New York Quartermaster Procurement Agency.

(Title 18, United States Code, Section 201).

.....
Foreman

.....
PAUL W. WILLIAMS
United States Attorney

FILE COPY

FILED
MAR 17 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 436

RAYMOND WOOL,
Petitioner,

AGAINST

UNITED STATES OF AMERICA,
Respondent.

BRIEF ON BEHALF OF RAYMOND WOOL, PETITIONER

ALBERT H. TREIMAN,
Attorney for Petitioner.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 436

RAYMOND WOOL,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

BRIEF ON BEHALF OF RAYMOND WOOL, PETITIONER

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit has been officially reported at 258 F. 2nd 9. A copy of the opinion appears at page 80 of the Transcript of Record.

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit which is sought to be reviewed herein was made and entered on the 11th day of August 1958. The jurisdiction of this Court is invoked under Title 28, Section 1254 (1) U. S. C.

On December 8th, 1958 an order was made by the Supreme Court of the United States granting a petition for a writ of certiorari (p. 91).

Statutes Involved

Title 18, United States Code.

> "Section 371. Conspiracy to commit offense or to defraud United States.
>
> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment proved for such misdemeanor."

Title 18, U. S. C.

> "Sec. 3500. Demands for production of statements and reports of witnesses.
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine

to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Title 18, Rule 51 U. S. C.

Exceptions Unnecessary

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time of the ruling or order of the court is made or sought, makes known to the court the action which he desires the

court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 26 Evidence

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Question Presented for Review

Were the rights of the petitioner substantially prejudiced when the trial court denied the motion of the defendants to direct the Government to produce a statement which a witness for the government had previously given to government agents?

Statement of the Case

By its indictment, the Government charged that Raymond Wool in concert with other codefendants named therein, conspired to defraud the United States Government in reference to certain Government contracts (Page 12).

The Government called Melvin Carlin to testify on its behalf. His testimony appears in the record commencing with page 21 and ending with page 73. Essentially his testimony was that he was an accountant for a firm known as Bonita Originals owned by Leon Levy, a government witness, and Maurice Ades, a co-defendant. He then re-

lated that in 1952 he had met the co-defendant Marvin Rubin. That around April or May of 1952 there was a meeting held at which there was present Ades, Levy, Rubin and Carlin (page 25). At this meeting Rubin presented a plan wherein he represented that he knew people at the Quartermaster Corps. and that these people would assist him in getting Government contracts. He originally demanded half of the profits and finally agreed to accept a third of the profits (p. 27). Mr. Carlin further testified that Rubin would require about 5% of the contract price to be used as expense money for favors that might be extended to him by Government personnel (p. 30). He also testified that a check drawn on June 13th, 1952 to the order of Leon Levy was cashed and this was an item used by Rubin to pay for expenses he had incurred at Quartermaster (p. 33).

He then went on to discuss a series of checks and stated that all of these checks represented amounts used by Mr. Rubin for the express purpose of paying off Government personel.

Sometime after and in September of 1952 the defendant Raymond Wool was assigned to what is referred to as ASTAPA which took the place of Quartermaster Corps. Raymond Wool was a Captain in the Army who from time to time was assigned as a contracting officer for various government contracts dealing with clothing at ASTAPA.

The witness Carlin at no time directly implicated the defendant Wool but at best laid the ground work for the proof of a conspiracy. In cross examination by Mr. Sullivan, the attorney for the defendant Rubin, the witness Carlin was asked whether he had given a statement of the events he described to Government officials. He said he did and then he was asked whether he signed such a statement and the witness stated "I believe I did" (p. 46). Immediately thereafter Mr. Sullivan asked for the produc-

tion of the statement and the Court refused. Mr. Sullivan then asked that the Court examine the statement to ascertain if there were any inconsistencies and the Court refused to do so (p. 46). Page 74 of the record sets forth the argument between Mr. Sullivan and the Court on the question of the production of the statement, and the Court took the position, that unless there was proof of inconsistencies, counsel was not entitled to view the statement or to impose upon the Court to view the statement.

The witness that followed Mr. Carlin was Mr. Leon Levy.

Mr. Levy testified in great detail as to various transactions between Mr. Rubin and Government personnel stating that Mr. Rubin had asked for various sums of monies to pay off Government personnel including Captain Wool. He described how Rubin told him that for various sums of monies Captain Wool and another worked hard to get another company to assign its contract to Bonita Originals.

Levy also related that Rubin had told him that in his presence Lev had paid off Captain Wool in order to obtain a very large government contract for Navy hats.

The Government sought to prove its case through the testimony of Carlin and Levy setting the foundation for the conspiracy and then presented testimony of other witnesses who testified to various circumstances that occurred at approximately the time described by Levy and argued that this was circumstantial evidence which the jury can consider as tying in Wool with the conspiracy. For example, the Government pointed to the fact that Captain Wool approved the assignment of the Contract from R & J Garments to Bonita Originals. The Government also pointed to the fact that Captain Wool was the successor contracting officer on the Bonita contracts; he was the contracting officer who awarded the white hat contract to Lev;

Captain Wool purchased a home for which he paid approximately $8,000 in cash.

All of the circumstantial evidence presented against Wool is as consistent with innocence as it is with guilt and if the proof of the basic conspiracy falls then the entire case against Raymond Wool collapses.

ARGUMENT

POINT I

The Court seriously prejudiced the defendant's rights by refusing to permit defense counsel to examine a prior statement made by a Government witness.

As was pointed out in the statement above, the attorney for Rubin requested that he be furnished with a copy of the statement made by Carlin to Government agents and this request was denied on the ground that there was no inconsistency shown between the testimony of Carlin and the statement he made before permitting counsel to examine the statement. The seriousness of the error can best be pointed out by quoting the very language of the Supreme Court of the United States in the decision known as *Jencks* v. *U. S.*, 353 U. S. 657 when the Court stated at page 667 of the decision:

> "Every experienced trial judge and trial lawyer knows the value of impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the report of facts related at the trial, or a contrast in emphasis upon

the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

"Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, * * * the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal Courts and must therefore be rejected."

The injustice that arises from a refusal to permit counsel to examine a prior statement made by a Government witness is further emphasized in the *Jencks* decision when the court continues at page 668 in the following language

"Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense the defense must initially be entitled to see them to determine what use may be made of them. *Justice requires no less.*" (Emphasis supplied.)

Let us now examine how the trial Court's ruling affected the entire course of the trial.

Observing the sequence in which the witnesses were produced by the prosecution we note that Carlin was the first witness produced by the Government who testified in reference to the manner in which the conspiracy was to be conducted and on what basis. He also testified in reference to the initial conspirators. The other defendants such as Wool were brought into the picture by witnesses who followed Carlin. For example the very next witness was

Levy and the weight of his testimony is best characterized by the Court of Appeals for the Second Circuit when they refer to his testimony as being "terribly devastating" (p. 85).

It was more than amply shown that Levy had made statements to the Senate Investigating Committee in executive session and to their investigators before appearing before the committee.

In view of the ruling of the court that inconsistencies must be shown before statements can be shown to defense counsel, it became a futile gesture to make the identical request for Levy's statements without prior proof of inconsistencies.

Once the court ruled under what circumstances such statements could be obtained, counsel for all of the defendants were bound by the ruling and were no longer required to make similar requests only to be overruled. Our criminal procedures have been progressing away from the strict common law rules where the trial of the criminal case became a game of wits between counsel for the respective sides. For example under the common law rule unless an exception was taken to a ruling or order of the court, the party that was overruled lost his right to raise the issue on appeal. This was changed by Rule 51 of Title 18 U. S. C. that has made exceptions unnecessary as long as he has raised an objection to the action of the court. The Rule is even broader when it states that if the party had no opportunity to object he would not be prejudiced.

Rule 26 of the Rules of Criminal procedure points up that the admissibility of evidence and the competency and privileges of witnesses shall be governed by the principals of the common law in the light of reason and experience.

Reason and experience support the contention that once the trial court has ruled under what circumstances counsel

for the defense may receive a copy of a prior statement made by a Government witness, the court would not rule differently in the case of a subsequent witness unless his original ruling was complied with.

The court must therefore conclude that the appellant, Wool, was injured not only by the refusal to permit counsel to examine Carlin's statement but was foreclosed from making similar applications as to subsequent witnesses.

POINT II

The passage of Section 3500 of Title 18 U. S. C. does not alter the harm done in the trial Court.

After the trial, Congress passed Section 3500 of Title 18 U. S. C.

In the Court of Appeals it was argued that since the Government has submitted an affidavit *in camera* that no statement exists that the witness Carlin signed or had transcribed, that the section cited above would bar the defendant from an examination. It was further argued that the only document that exists is a summary made by a Government agent of the statements given to him by Carlin.

The Court of Appeals adopted this argument in its decision and came to the conclusion that the trial court's error is rendered harmless (p. 86).

It is respectfully submitted that in light of all of the circumstances the trial Court's ruling created tremendous mischief.

The witness testified that he did in fact make a statement and he believed he had signed it (p. 46). If it is true that he did not give a statement and at that point when the demand was made it turned out that there was no such

statement this would tend to impeach the credibility of the witness. But since the court ruled that we were not entitled to this statement on the grounds that there was a failure to prove inconsistency then the jury had the right to draw the conclusion that there was such a prior statement and that it was consistent with his testimony and therefor he was a truthful witness. With this turn of events, defense counsel were left helpless to impeach the witness.

The passage of the Section in question does not eliminate the problem that arises as to how the trial would go in reference to statements made by subsequent witnesses. Assume that under the circumstances defense counsel would not be entitled under the statute to Carlin's statement, it does not follow that defense counsel would not be entitled to statements given by Levy and the witnesses that followed Levy.

It has been agued that only such a statement can be introduced under Section 3500 as has been either signed, adopted, or approved by the witness or a transcription which is substantially a verbatim recital of an oral statement made by the witness. Since an affidavit was submitted to the Court of Appeals signed by the investigator in which he states that the summary was neither adopted or approved by Carlin nor was it a substantially verbatim recital of an oral statement made by Carlin, we, as defense counsel, would not be entitled to examine same. This places the defendant in a position where he is bound by a decision made by the investigator. Such a question must be determined at the trial and the witness can be asked then whether he adopted such statement as his own rather than bind defense counsel by an affidavit made *ex parte*.

CONCLUSION

It is respectfully submitted that the conviction of the defendant Wool should be reversed and the indictment dismissed or, in the alternative, that the matter should be remanded to the District Court for a new trial.

Dated: New York, New York
March 12th, 1959

Respectfully submitted,

ALBERT H. TREIMAN,
Attorney for Petitioner.

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Supreme Court of the United States

October Term, 1958

No. 437

MARVIN RUBIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ISIDOR ENSELMAN,
Attorney for Petitioner.

JOHN T. SULLIVAN,
Of Counsel.

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Supreme Court of the United States

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MARVIN RUBIN,

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully shows:

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit in connection with which a Writ of Certiorari is sought hereby was entered on August 11, 1958. On September 9, 1958, Mr. Justice Harlan granted an extension of time within which to file this petition to and including October 10, 1958.

Jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C. Section 1254.

Opinions Below

The opinion of the Court of Appeals is not yet reported. A true copy of the same is attached hereto and designated as Appendix to Petition.

Questions Presented

(1) Whether the trial court committed reversible error in making a ruling during the testimony of the first important Government witness that existing previous statements of Government witnesses need not be produced unless defendants' counsel demonstrated an inconsistency between the testimony of the witness and the contents of the statement sought to be produced.

(2) Whether the Court of Appeals was correct in designating the trial court's concededly erroneous ruling as "harmless error" because of the enactment of the supervening statute enacted by Congress (18 U. S. C. Sec. 3500 (a) (b) (e) (1) (2) as a result of the decision of the Supreme Court of the United States in *Jencks* v. *United States* (353 U. S. 657).

(3) Whether the Court of Appeals may accept and predicate its decision on documents which were not part of the trial record and which contradicted the sworn testimony of the Government's own witness.

(4) Whether the Court of Appeals erred in completely disregarding the contention of petitioner herein that the admitted error of the trial court, as clearly enunciated in the *Jencks* case, applied not only to the first Government witness as to whose testimony the production of a previous statement was refused but also to all the subsequent witnesses who were not asked about such statements because of the trial court's emphatic exposition of his erroneous concept of the doctrine announced by this Court in *Gordon* v. *U. S.* (344 U. S. 414).

Statutes Involved

Petitioner, Marvin Rubin, was charged and convicted of violations of the two following Federal Statutes:

"Title 18 U. S. C.

Section 371. Conspiracy to commit offense or to defraud United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." (June 25, 1948, c. 645, § 1, 62 Stat. 701.)

"Section 201. Offer to officer or other person.—Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may by law be brought be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or

value of such thing or imprisoned not more than three years, or both.

This section shall not apply to violations of section 212 of this title." (June 25, 1948, c. 645, § 1, 62 Stat. 691.)

The following Statutes are also involved in this application:

"Section 3500. Demands for production of statements and reports of witnesses.—(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) The term "statement" as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of

such oral statement. (Sept. 2, 1957, P. L. 85-269, 71 Stat. 595.)

"Title 28 U. S. C.

Section 1254. Courts of appeals — Certiorari — Appeal—Certified questions.—Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire matter in controversy." (June 25, 1948, c. 646, § 1, 62 Stat. 928.)

"Title 28 U. S. C.

Section 2111. Harmless error. — On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." (June 25, 1948, c. 646, § 1, as added May 24, 1949, c. 139, § 110, 63 Stat. 105.)

Statement of Case

As the aftermath of a full-dress U. S. Senate Committee investigation complete with all the publicity and television trappings with which the nation has been regaled in recent years, the petitioner herein, together with eight other persons was charged in an indictment with a conspiracy to

defraud the United States Government in violation of Title 18 U. S. C. Sec. 371. The said petitioner was also charged in the second and third counts of the indictment with bribery in violation of Title 18 U. S. C. Sec. 201. Upon motion of the prosecution, a severance was ordered of the trial of three of the named defendants, including one, Joseph G. Porreca, a Government inspector who pleaded guilty and testified as a prosecution witness.

After a lengthy trial (six weeks), the jury rendered a verdict of guilty as charged against all the defendants except that petitioner and defendant David Pollack, a Government employee, who was charged in the second count of the indictment with accepting a bribe proffered by petitioner, were acquitted of the charges contained in the said second count. Petitioner was convicted under the first and third counts. The verdict of the jury included a request on the part of the jury for clemency as against all defendants. On May 15, 1957, petitioner was fined $1,000 on Count One of the Indictment and sentenced to fifteen months imprisonment on each of Counts One and Three, the same to run concurrently.

The offenses of which the defendants were convicted were alleged to have been committed in connection with procurement contracts for garrison hats for the U. S. Army Quartermaster Corps and white sailor hats for the U. S. Navy. The white hats were manufactured in Puerto Rico. The defendants were all men of previously unimpeachable honesty and integrity. Not one had ever been convicted or even accused of any previous offense. The principal Government witness was Leon Levy, an unindicted accomplice, who glibly and fearlessly testified to having participated in the commission of many crimes during his tenure of occupancy of the witness chair. He was shown to be a former business associate of defendants Rubin and Ades embittered because he had not been included in the subsequent business activities of his former associates.

The testimony of the defendant Porreca, the Government inspector who pleaded guilty prior to the trial and testified for the prosecution, was without doubt the evidence which tipped the scales against the defense. In his testimony before the Senate Committee and during the trial, he perjured himself almost endlessly. He frankly admitted he had perjured himself before the Senate Committee on cross-examination. For his assistance to the prosecution, he won himself a suspended sentence.

Both Leon Levy and Porreca had undoubtedly given and signed statements to several federal law enforcement agencies. Such statements would have been invaluable to defense counsel on cross-examination of these two admitted rogues. Request was not made for such statements because of the emphatic ruling of the trial Judge Hon. Irving Kaufman during the testimony of the first real witness called by the prosecution after some introductory testimony by an expert witness (340-395).[1]

At the first opportunity, after the direct testimony of this witness, Melvin Carlin, an accountant, Mr. Rubin's counsel, Mr. John T. Sullivan, inquired whether a statement had been given by the witness to any Government investigator (340-343).

After receiving an affirmative reply that such a statement had been given to investigators for the U. S. Senate Committee, demand was made for the production of the same. The following colloquy between Court and Counsel then ensued (346):

> "Mr. Sullivan: If the Court please, I ask for the production of that statement.
>
> Mr. Christy: No proper foundation for that, your Honor.
>
> The Court: I don't think you have laid any foundation merely by asking if a statement was given.

[1] Numbers in parentheses refer to the page in the certified transcript of the Record on Appeal herein.

Mr. Sullivan: What was your ruling, if your Honor pl ase?

The Court: I don't think you have laid sufficient foundation for the production of the statement?

Mr. Sullivan: I would ask the Court to look at the statement to see if there are any inconsistencies?

The Court: I don't think you have even laid a foundation for that."

Immediately thereafter, in questioning the witness concerning a most important document, a $1000 check, the proceeds of which it was contended by the Government was given to Rubin for alleged payoffs, the witness testified as follows (347-349):

"Q. Did you tell Mr. Poole and Mr. Balaban on your meeting with them the first time the Government agents talked to you that you had put that check under the category of 'Entertainment'? A. I posted it, yes.

Q. You posted it in the books yourself? A. Yes, I posted it myself.

Q. Now, did you tell Mr. Poole and Mr. Balaban that it was you who posted it under the category 'Entertainment'? A. I don't know whether I did or didn't. It is in my handwriting. If they asked me, I must have surely said that I did.

Q. When you posted that thousand dollars under the category 'Entertainment', had you looked at the checkbook of Bonita Originals, from which this check had been taken? A. Yes."

Thereafter the stub of the checkbook was put in evidence by counsel for Rubin as defendants' exhibit and the witness gave the following testimony (347-349):

"Q. Mr. Carlin, when you made the entry of one thousand dollars, did you observe that checkbook which said that the check 2213 was an exchange? A. I did."

Thus the Government witness, a certified public accountant, was forced to admit he had made a false entry in the company's books.

Thereafter further demand was made for the statement as follows (394-395):

> "Mr. Sullivan: If the Court please, may I address you?
>
> If your Honor please, according to the case of Gordon v. United States, 344 U. S. 414, it was my understanding having to do with the prior statement that I asked to be furnished to me, that was given to Balaban and Poole, it was my understanding that if I can tell your Honor of a specific statement, that then the rule is that you see the statement and observe if there is any inconsistency, and if there is, you give it to me; am I mistaken in that?
>
> The Court: That is substantially correct.
>
> Mr. Sullivan: Well, I did ask for the specific statement given to Balaban and Poole.
>
> The Court: I know, but you didn't point out that there was any inconsistency. That is the obligation.
>
> Mr. Sullivan: I don't have to, as I understand it.
>
> The Court: Oh, yes you do. You must at least indicate to me something that makes it appear that there might have been something inconsistent in that statement. Then I would read it over. But there wasn't the slightest indication. As a matter of fact, everything you brought out indicated that it was consistent. The mere request doesn't make it necessary for me to look at it. Otherwise the Court would be busy all day long looking at every possible document that had anticipated the case. You may show something inconsistent, because that is the only purpose upon which you could use it, or at least something that tends to make us believe that there was something inconsistent, and then the Court has an obligation to look at it.
>
> I am familiar with the entire line of cases."

Thus the Court once and for all the purposes of this trial made the far reaching ruling which effectively limited and hamstrung all defense counsel on cross-examination, exceptionally vital in this case, which turned for the most part on relatively uncorroborated verbal assertions of Government witnesses. Had counsel been able to secure the pro-

duction of previous statements by Carlin, Levy, Porreca and the other Government witnesses, the defendants might very well have been able to secure a verdict of acquittal from the jury. It is most significant that the jury during the course of its deliberations asked that the cross-examination of Carlin be read again and eventually recommended leniency after first inquiring whether leniency could be secured through them. The length of time they remained in session and their many requests for instructions all denoted a doubtful and troubled attitude on their part.

The Court made its ruling so clearly that subsequent requests for such previous statements of witnesses might very well have been deemed offensive and contumacious in the presence of the jury. If the Court had ruled properly on the law as enunciated in *Gordon* v. *United States*, *supra*. after counsel had expressly referred to the case, then, of course, subsequent requests for all such statements would have been in order. In such circumstances, counsel is certainly not required to indulge in repetitious requests and objections.

The Court's attention is called to the fact that the case at bar contains other manifestations of an erroneous conception on the part of the trial court as to the right of the defense to statements and documents in the possession of the Government. There were at least two matters of the same nature which were accorded the same treatment by Judge Kaufman. The witness Levy utilized a memorandum in Arabic to refresh his recollection. This was, of course, made available to defense counsel for their inspection but there were other memorandums or diaries also in Arabic which were in the possession of the prosecution which were not produced although counsel for the defense had in effect requested that they be turned over to defense. The colloquy between the Court, Mr. Christy and Mr. Gould, counsel for defendant Lev (55-57) amounts to a request for these

diaries and a refusal by the Court at the time of the request to turn them over. The Court stated as follows:

> "The Court: Very well, that apparently is it at the present time. There will be no direction 'now to turn' over all of them. If during the course of the trial it becomes apparent the other notes are important, then I will rule on it at that time." (The stenographer's minutes read "out of turn" but obviously the Court said "now to turn".

The Court further stated (53):

> "The Court: Whether or not you will be able to see any other part of the notes is another problem.
> Mr. Gould: Will depend on the state of cross-examination.
> The Court: That is correct.
> Mr. Gould: Very well, sir. I understand it very clearly.
> The Court: That will depend upon the state of the law."

Necessarily the request of counsel for the other Arabic notes utilized in the Senate investigation was based on even stronger and more compelling grounds than the request for Cariin's statement. Under no possible rule of law could the Court have refused to direct the turning over of these memos or even to have deferred ruling on same.

The same pattern was followed as to the minutes of the Senate Committee. The record of the public sessions in book form was distributed throughout the country to anyone asking for them; but the minutes of the closed or executive sessions were not made available to defense counsel. On the occasion when the Government made an offer of proof as to the testimony of defendant Pollack before the Senate on the theory of consciousness of guilt the Assistant District Attorney stated as follows (59-60):

> "We have provided defense counsel, at least Mr. Carroll, with a copy of the *Executive Testimony* of

> David Pollack from which testimony we wish to introduce certain parts, * * *." (Emphasis supplied.)

Thereafter Mr. Carroll, counsel for Pollack, stated:

> "Mr. Carroll: I have examined the seven pages of *selective quotation* which Mr. Christy submitted to us at the close of the last session, * * *." (Emphasis supplied.)

Apparently the Government didn't even furnish the full context of the executive testimony from which they proposed to read excerpts. It is submitted that these prejudicial actions of the prosecution stemmed from the original ruling of the trial court during the Carlin testimony.

Of course there cannot be the slightest doubt that under the doctrine of *Jencks* v. *United States*, decided shortly after this trial ended, the conviction of Rubin on both counts would have been reversed had it not been for the supervening enactment of Title 18 U. S. C., Sec. 3500 (a) (b) (c) (1) (2). In this connection, the opinion of Chief Justice Clark of the Court of Appeals stated as follows:

> "* * * Since the decision in Jencks v. United States, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony. But before a new trial is to be ordered, we must see if the statement is in any event discoverable. * * *"

Thereafter the distinguished Chief Judge asserted that the U. S. Attorney had furnished the Court in a sealed envelope from the Senate Committee, a Senate investigator's summary of an interview with the witness Carlin, accompanied by an affidavit which, to use Judge Clark's word "establishes" that the summary submitted is the only written record made of Carlin's interview and that it was written following the interview and is not a substantially verbatim record of Carlin's statement.

Judge Clark then goes on to state that while defendants "may perhaps" have been given a right to inspect a statement of this nature by the *Jenck's* decision, the recent codification of discovery on this situation would not allow petitioner the right to examine the investigator's summary on a new trial and therefore the error is rendered harmless by the supervening statute.

There is not a single word in the opinion of the Court of Appeals which in any way disposes of the petitioner's contention that his defense was hampered and prejudiced from that point forward by the trial court's error which the Court of Appeals apparently holds would have required a reversal as to Rubin were it not for the enactment of the new Statute.

A reading of the pertinent excerpts from the record of the trial will demonstrate beyond even the slightest peradventure of doubt that regardless of whether the Senate investigator or the Government witness Carlin is telling the truth as to the existence of a statement signed by the witness Carlin, there are other such statements in existence as to other and more important Government witnesses which will certainly prove to be inconsistent judged by any standard and therefore available to petitioner under the new Statute upon a new trial.

Reasons for Granting the Writ

The reasons why petitioner believes a writ of certiorari should be granted herein are twofold:

Firstly, the decision of the Court of Appeals and the opinion of Chief Judge Clark are in conflict with applicable decisions of this Court to wit: *U. S.* v. *Jencks* and *U. S.* v. *Gordon, supra.*

Secondly, the Court of Appeals has decided an important question of federal law, i.e., the application of the new statute, Title 18—U. S. C., Sec. 3500(a)(b)(e)(1)(2), which has not been but should be settled by this Court.

I

The Trial Court committed reversible error in ruling during the testimony of the first important Government witness that existing previous statements of Government witnesses need not be produced unless an inconsistency between the testimony of the witness and the contents of the statement be shown.

The ruling complained of was made by the trial judge during the course of the lengthy trial which culminated with the jury's verdict on April 25, 1957, prior to the announcement by this Court on June 3, 1957 of its decision in *Jencks* v. *United States, supra.*

However, there can be no doubt that the Court's ruling constituted reversible error under the doctrine of the *Jenck's* case and also under *Gordon* v. *United States, supra.* which latter case was specifically called to the Trial Court's attention by counsel for petitioner. Moreover, the opinion of the Court below recognizes and concedes that by virtue of the decision in the *Jencks* case, reversible error was committed.

It is deemed most important that this Court fully comprehend the devastating consequence to the defense which ensued as a result of this ruling. The error permeated and tainted the entire trial from that point forward. The statement of facts set forth above and the excerpts from the testimony which are quoted demonstrate partially but by no means completely the improper prejudice to the defense which resulted from the Trial Court's curtailment of cross examination.

II

The Court of Appeals erred in designating the concededly erroneous ruling of the Trial Court as harmless error.

The argument advanced by the Court of Appeals in support of the proposition that Judge Kaufman's admittedly erroneous ruling constituted at most only harmless error is predicated upon a series of wholly unjust premises right at the outset. The Court virtually concedes that, absent the new statute, a reversal and a new trial would be required as to the defendant Rubin, and then by a process of accepting without any test of genuineness or credibility a gratuitous statement from some unidentified individual attached, or supposedly attached, to the Senate Committee staff together with what the Court characterizes as an "additional affidavit" which "establishes that the so-called" summary in the Senate envelope is the only written record of the witness Carlin's interview (although Carlin himself testified that he had signed a statement) the Court by invoking the precise clauses of the new legislative enactment imposes the provision of this statute *ex post facto* upon the proceedings of the trial which was held although the statute was not in existence or even thought of at the time. The weakness of the Court's argument as to these post trial additions to the record on appeal is nowhere more manifest than in the Court's own language. After stating that the "additional affidavit establishes" that the summary is the only written record made of Carlin's interview, although Carlin swore otherwise, and it "is not a substantially verbatim record of Carlin's statement". Then the Court goes on to say that—

> "We have examined the summary and internal evidence from it *tends* also to bear this out." (Emphasis supplied)

Whatever the mysterious "internal evidence" is, in any event it only *tends* to bear this out. One thing is certain, the defense has had no opportunity to ascertain whether this so-called summary is or is not a substantially verbatim record of Carlin's statement. No opportunity has been afforded to petitioner to put Senate Committee employees and affiants under oath to get at the truth of this curious business.

Parenthetically, it is readily apparent that the way is now open and clear for Government investigators to circumvent and emasculate even the meager and limited aids to the accused provided by this unwise and unjust statute. By merely wording their reports of oral statements in such a fashion as to negative any implication of verbatim recitals, they can be certain that defense counsel may never confound their witnesses with contradications between the testimony at the trial and the statements made at the time when the incidents testified to, actually occurred.

The opinion and conclusion of the Court below is not based upon the error and impropriety of the limitation of cross examination which was imposed upon the defense at the trial. It is derived from a fiction of what would happen at a new trial which in turn is based on premises which could very well turn out to be spurious if tested by a proper forum of inquiry where Senate investigators and employees could be placed under oath to determine the true nature of this summary.

III

The Court of Appeals exceeded its authority in accepting and predicating its decision on documents which were not part of the trial record and which contradicted the sworn testimony of the Government's own witness.

The infirmities of the procedure utilized by the Court of Appeals in accepting incompetent documents outside of the record to support its proposition that the violation of the doctrine of the *Jencks* and *Gordon* cases which occurred at the trial was only harmless error have been carefully spelled out in the preceding point. Suffice to say, the petitioner was entitled to have his appeal decided not on what may, as a matter of rank conjecture occur at an imaginary new trial which cannot take place in any event as of the present time, but on the hard cold facts of what did occur, i.e., the improper restriction of cross-examination by the Trial Court in a case which turned on very close questions of fact.

The rule of law that an appellate court may, on appeal, consider documents which are not part of the record of a trial is carefully limited in its scope. First of all such documents may never be considered or utilized in reversing a judgment or an order appealed from and secondly only *incontrovertible documents* may be so received. (*O'Connor-Sullivan, Inc.* v. *Otto*, 283 App. Div. 269, 127 N. Y. S. 2d 373 at page 377; Vol. 6 Carmody's New York Practice Sec. 316; *Latourelle* v. *New York Central Railroad Company*, 275 App. Div. 123, 89 N. Y. 2d 296.)

In *Stemmler* v. *The Mayor of New York*, 176 N. Y. 476 at page 483, the rule is limited to the reception of record evidence. *People ex rel. Warschauer* v. *Dalton*, 159 N. Y. 235, 239; *Wines* v. *Mayor, etc. of N. Y.*, 70 N. Y. 613; *Matter of Cooper*, 93 N. Y. 507; *Day* v. *Town of New Lots*, 107 N. Y. 148; *Dunham* v. *Townsend*, 118 N. Y. 281; *Atlantic Ave. R. R. Co.* v. *Johnson*, 134 N. Y. 375.

Thus public documents such as deeds or mortgages or records of a permanent public office engaged in a usual routine of business would appear to be the type of document permitted to be perused under the holdings of the cases. Certainly the summary and the affidavit described by the Court of Appeals in its opinion fall far short of any compliance with these standards. The Senate Committee is not in any sense a permanent continuing body of the nature of a County Clerk. Furthermore, only an ostrich could immunize itself from the unvarnished truth that the chairman, counsel and investigators of the Committee are not disinterested parties. In fact, the Committee's counsel has in recent weeks expressed severe criticism of the Attorney General of the United States for his failure to indict and convict on cases referred to him by them. They want convictions to support their proceedings and pronouncements.

The Court of Appeals clearly had no right under the rule to consider the summary and the affidavit submitted to them by the U. S. Attorney in their deliberations. Many unwarranted inferences and conclusions must necessarily be implied and speculated upon from these documents before the sworn testimony of the Government witness is overcome and the conclusions of the Court of Appeals that the summary is the only written record of Carlin's interview and would not be as discoverable under the new statute, can be made digestible.

IV

The Court of Appeals erred in completely disregarding petitioner's contention that the trial court's erroneous ruling on the production of previous statements limited the cross-examination as to all subsequent witnesses.

Assuming, *arguendo*, that the Court of Appeals was correct in designating the trial court's error as harmless in the light of the new statute and the documents furnished to it for its appellate deliberations by the Senate Commit-

tee, it is respectfully submitted that this court should grant Certiorari in any event because of the devastating effect which the ruling in question exercised upon the cross-examination of all other witnesses. In a new trial, the Government would be forced to produce, for the trial court's inspection and for use by defense counsel, previous statements made by the two principal witnesses, Leon Levy and Joseph Porreca. Levy, the unindicted, self-confessed criminal, undoubtedly gave many statements to federal law enforcement agencies. Porreca, the chief inspector who bought his freedom from incarceration by his testimony, may very well have purchased his emancipation from many other prosecutions by his testimony if the truth could be brought out on cross-examination. He had the effrontery to testify that although he has supervised numerous other contracts as to the vital inspection and acceptance, this was the only time he ever was paid anything. His testimony on cross-examination as to the deep freeze is susceptible of only one interpretation. He extorted it from Rubin (1229-1324).

On a new trial, the Government would be forced to produce the full minutes of the closed sessions of the Senate Committee and the full text of the Arabic diaries which were not given to defense counsel at the trial.

As has been stated hereinbefore, the trial court's erroneous ruling permeated and tainted the entire trial, from the moment it was made down to the last word of the testimony of the last witness.

In *Elenkrieg* v. *Siebrecht*, 238 N. Y. 254, 263; 144 N. E. 519, the late Chief Judge Frederick Crane of the Court of Appeals of N. Y. stated:

> "It was not necessary for the defendant's counsel to except to the judge's charge in order to preserve the force and effect of his exception taken to the denial of his motion made at the end of the case * * * One exception upon the same ruling was as good as two."

See also *Stephens* v. *Ely*, 162 N. Y. 79; 56 N. E. 499. Note: Need not repeat same objection. *Church* v. *Howard* 79 N. Y. 415, 421; per Miller, J. See *Sherman* v. *Delaware etc.*, 106 N. Y. 542; 13 N. E. 616.

In *Kansas City Southern Ry. Co.* v. *Jones*, 241 U. S. 181, 183; Mr. Justice McReynolds stated as follows:

> "In such circumstances it was unnecessary to go through the idle form of articulating the obvious. If timely objection upon the ground ultimately suggested by the Supreme Court had been sustained, it could have been easily obviated * * *"

In *Brettman* v. *Braun*, 37 Ill. App. 17, 18, Gary, P.J. used the following language:

> "It is not really necessary that the court shall commit the same error more than once in the same case, to bring it before a court of appellate jurisdiction for review."

CONCLUSION

The petition for certiorari should be granted and the judgment affirming the conviction of petitioner reversed.

Respectfully submitted,

ISIDOR ENSELMAN,
Attorney for Petitioner.

JOHN T. SULLIVAN,
Of Counsel.

APPENDIX

Opinion of United States Court of Appeals, for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 283—October Term, 1957

(Argued April 29, 1958 Decided August 11, 1958)

Docket No. 24809

—o—

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRY LEV, MARVIN RUBIN, MAURICE ADES and RAYMOND WOOL,

Defendants-Appellants.

—o—

Before:

CLARK, *Chief Judge,*
and HINCKS and STEWART, *Circuit Judges.*

—o—

Appeal from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge.*

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from their convictions of conspiracy to defraud the United States, 18 U. S. C. § 371, and Rubin also appeals from his conviction of bribery, 18 U. S. C. § 201. Affirmed.

—o—

ARTHUR H. CHRISTY, Chief Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and Fioravante G. Perrotta and Joseph T. Altier, Asst. U. S. Attys., New York City, on the brief), *for appellee.*

MILTON S. GOULD, of Gallop, Climenko & Gould, New York City (George Trosk, of Gallop, Climenko & Gould, New York City, on the brief), *for defendant-appellant Harry Lev.*

JOHN T. SULLIVAN, New York City, *for defendant-appellant Marvin Rubin.*

THOMAS J. SHORT, of Dougherty, Ryan & Mahoney, New York City, *for defendant-appellant Maurice Ades.*

ALBERT H. TREIMAN, New York City, *for defendant-appellant Raymond Wool.*

CLARK, *Chief Judge:*

Harry Lev, Marvin Rubin, Maurice Ades, and Raymond Wool appeal from a verdict and judgment of conviction for conspiracy to defraud the Government in violation of 18 U. S. C. § 371. Rubin also appeals from a conviction for bribery in violation of 18 U. S. C. § 201. The defendants were indicted for a single conspiracy to defraud the United States in the administration and procurement of Government contracts. Alleged errors involve principally a claimed variance between a charge of a single conspiracy and proof of two, and a failure to order a statement from a Government witness delivered to the defense for use in cross-examination. Ades and Wool also claim an insuffi-

ciency of the evidence, as does Rubin with respect to the bribery charge.

The proof adduced at the trial below tended to show overt acts between February 1952 and about August 1953 involving the procurement and administration of two contracts awarded to Bonita Originals, Inc., for the manufacture of Army garrison caps, and overt acts in the period commencing in April 1953 and continuing on into 1954 involving the procurement and administration of a contract award to Spencer Manufacturing Corporation for the manufacture of white hats for the Navy. During the former period Ades was the president and owner of 50 per cent of the stock of Bonita, Rubin was employed by Bonita on a profit-sharing basis to deal with Government officials on the garrison cap transaction, and Wool, an Army officer in the Quartermaster Corps, was assigned the Bonita contracts for administration until they were completed. Lev was not involved in either the procurement or the administration of the Bonita contracts. But Lev, Ades, and Rubin were all interested in Spencer Manufacturing Corporation and involved in the procurement and administration of the white hat contract. Wool was appointed a Contracting Officer of the Armed Services Textile and Apparel Procurement Agency (ASTAPA) prior to the award of the white hat contract and participated in both the award and the administration of that contract. On this proof Judge Kaufman, for the defendants' benefit, charged the jury that in fact two separate conspiracies were involved—the Bonita conspiracy and the white hat conspiracy—although he expressed doubts as to whether it was improper to characterize the conspiracy as a single one.

Defendants urge that a fatal variance occurred between the indictment and the proof concerning the number of conspiracies, and that this error was compounded by confusion on this point in the court's charge to the jury. A claim of variance is not unusual in a conspiracy case, *United States* v. *Rosenberg*, 2 Cir., 150 F. 2d 788, 793, certiorari denied

326 U. S. 752, and the courts have not evolved clear lines for distinguishing single and multiple conspiracy situations. Cf. *Blumenthal* v. *United States*, 332 U. S. 539; *Berger* v. *United States*, 295 U. S. 78; *Kotteakos* v. *United States*, 328 U. S. 750; *United States* v. *Cohen*, 2 Cir., 145 F. 2d 82, certiorari denied *Cohen* v. *United States*, 323 U. S. 799; *Monroe* v. *United States*, D. C. Cir., 234 F. 2d 49, certiorari denied 352 U. S. 873; *Canella* v. *United States*, 9 Cir., 157 F. 2d 470. Here, although from Lev's vantage point the Bonita transaction was completely separate from the white hat transaction, from the viewpoint of the other appellants the conspiracy was a single one to defraud the Government in matters of war contracts. Thus as to Rubin, Ades, and Wool, who were involved in both transactions, there is, properly speaking, no variance. See *Canella* v. *United States, supra*, 9 Cir., 157 F. 2d 470; *cf. Blumenthal* v. *United States, supra*, 332 U. S. 539.

As Lev was involved only in the latter transaction, a more serious question of variance does arise as to him. In *Berger* v. *United States, supra*, 295 U. S. 78, 82, and *Kotteakos* v. *United States, supra*, 328 U. S. 750, 757, the Supreme Court set out the applicable rule in these circumstances: "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'effect the substantial rights' of the accused." In this Circuit the test applied has been stated as whether the conspiracies ultimately proved might have been joined in a single indictment and whether the trial was conducted so as to protect the rights of defendants who are not common to all conspiracies. *United States* v. *Cohen, supra*, 2 Cir., 145 F. 2d 82, 89. Although Lev claims that the confusion inherent in the indictment was compounded by the court's instructions, a thorough reading of the charge shows that Judge Kaufman was scrupulous in protecting Lev's rights. In fact it is apparent that the jury was able to differentiate between the evidence relevant to defendants involved in only one of the conspiracies, for it acquitted

defendant Pollock, who was alleged to be involved solely in the Bonita affair. It follows that the variance here was not prejudicial and was at most harmless error.

Ades and Wool claim that the evidence linking them to the conspiracy was insufficient to justify admitting in evidence against them the admissions of other conspirators. Two witnesses for the prosecution gave important evidence involving particularly statements by Rubin defining and particularizing the use of funds to pay for entertainment of and gifts to the Government inspectors. These were Carlin, accountant for Bonita, and Levy, secretary-treasurer and co-owner of Bonita. Levy's testimony particularly went into details of funds drawn by him for uses which Rubin's directions and explanations to him showed were improper, definitely bringing the others, notably Ades and Wool, into the conspiracy. Hence we must consider the independent evidence supporting the inference of participation in the conspiracy and justifying the receipt of this testimony against them.

The independent evidence linking Ades to the illegal plot shows that he was present at a meeting with Rubin in the spring of 1952 where Rubin allegedly stated that he would need 5 to 7 per cent of the contract price in order to entertain Government personnel. Ades then went to Puerto Rico, where he managed the factory which manufactured the caps and hats supplied the Government. There is testimony that, while running the plant in Puerto Rico, he induced a Government inspector, Ienni, to live at his apartment rent free; that he brought another Government employee named Schlesinger to Puerto Rico secretly under an alias; that he attempted to bribe another inspector, Watkins; that he wrote a letter attempting to have Forcillo, a Government inspector, removed because he was too tough; and that, even before the white hat contract was awarded, he was bragging that they would receive it.

As to Captain Wool, the proof was that he went to visit Rubin's office several times; that as the officer supervising

the procurement he granted valuable contractual deviations whenever they were requested, both in the Bonita contract and later to Lev; that he had several meetings with Lev before the opening of the bid on the white hat contract; and that as contracting officer he approved Lev's bid, although the pre-award survey showed that Lev had no machinery at all in Puerto Rico to manufacture the hats. There was testimony that in May or June 1953 Wool came to the Bonita office and took a topcoat and again, some children's dresses. There was further evidence from Rubin's doctor, Dr. Franklin, who testified that Rubin introduced Wool to him and that he treated Wool on nine separate office visits and rendered a bill for $265, which was paid by a check from the Bonita Corporation for $285 (thus including $20 for Rubin himself). Later when Rubin came to testify he said that Wool's affliction was deep-seated and of long standing, which no Army doctor had been able to reach, but which Dr. Franklin proceeded to cure by this course of treatment. This evidence stands uncontradicted on the record, and Wool (who did not testify) offered no satisfactory explanation of Bonita's making this payment for him. There was also considerable circumstantial evidence tending to show, when coupled with testimony as to statements made by an alleged coconspirator, that a month after the white hat contract was awarded Lev advanced him $5,000, which he used to complete payments on the purchase of a house. Later in testifying to a Senate committee investigating these frauds he claimed to have borrowed money and given a note to one Luciano, who denied this in testifying below. This testimony was presented by the Government to show consciousness of guilt. Thus the evidence offered as to both Ad s and Wool presents amply sufficient groundwork for the admission of testimony of statements by coconspirators and in particular for Levy's terribly devastating testimony, which, when believed by the jury, left no question of guilt.

Defendants Lev and Rubin assert that the trial court committed reversible error in refusing to order the Government to produce for their inspection a statement made by

Government witness Carlin to agents of a Senate investigating committee. Since the decision in *Jencks* v. *United States*, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony. But before a new trial is to be ordered, we must see if the statement is in any event discoverable. Although the statement is not a part of the lower court record, the prosecutor—who did not have it at the trial—has procured from the Senate committee and presented to us in a sealed envelope a verified copy of a Senate investigator's summary of an interview with Carlin. An additional affidavit establishes that this summary is the only written record made of Carlin's interview, and that it was written following the interview and is not a substantially verbatim record of Carlin's statement. We have examined the summary, and internal evidence from it tends also to bear this out.

While defendants may perhaps have been given a right to inspect a statement of this nature by the *Jencks* decision, *supra*, 353 U. S. 657, 668,[1] the recent codification of discovery in this situation allows a defendant to examine only the following:

> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U. S. C. § 3500(e)(1)(2).

---

[1] Here the Court said: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial." While not specified, it seems inferable that the F. B. I. recording of the reports made orally was contemporaneous with the making of the oral statements.

As this statute will apply on a new trial of any of these defendants, and as under it discovery of the summary cannot be required, the trial court's error is rendered harmless, *United States* v. *Miller*, 2 Cir., 248 F. 2d 163, certiorari denied *Miller* v. *United States*, 355 U. S. 905.

There remains to be discussed Rubin's contention that there was insufficient evidence for the jury to have convicted him of bribery. We think the evidence quite sufficient. There was proof that Chief Inspector Porreca, whose duty it was to assign inspectors, upon a request had removed Forcillo from Puerto Rico and replaced him with a more lenient man. Thereafter Rubin sent Porreca a deep freeze, for which Bonita paid. Porreca later received some meat to put in the freezer. He testified that he never paid for any of this, nor was he ever asked to pay for it. This was enough evidence of violation of the bribery statute, 18 U. S. C. § 201. The defense efforts to show that nothing Porreca did actually defrauded the Government are irrelevant as the statute shows.

This important trial discloses a sad and sordid picture of Government agents yielding to rather cheap temptation, some willingly, some only under pressure. But there is another side to the story, of inspectors who stood out at all times against such debauchery of their obligations and who were transferred to other activities for their pains. It is to be hoped that they received no permanent setbacks in their careers, but eventually were accorded that proper respect which they so richly merited.

Convictions affirmed.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 437

MARVIN RUBIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

ISIDOR ENSELMAN,
Attorney for Petitioner,
80 Broad Street,
New York, N. Y.

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IN THE

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—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 80-86) is reported at 258 F. 2d 9.

Jurisdiction

The judgment of the Court of Appeals was entered on August 11, 1958. The petition for a writ of certiorari was filed on October 10, 1958 and was granted on December 8, 1958.

The jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C. Section 1254.

Constitutional Provisions and Statute Involved

Amendment V to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment VI to the Constitution of the United States provides:

> "Rights of the accused.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 3500, Title 18, United States Code provides:

> "§ 3500. Demands for Production of Statements and Reports of Witnesses.
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified in direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraphs (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony

of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Publ L. 85–269, Sept. 2, 1957, 71 Stat. 595."

Questions Presented

(1) Whether the trial court committed reversible error in ruling during cross-examination of the first important Government witness that as prerequisites to the securing of an order from the court directing the prosecutor to produce for defendant's inspection existing and relevant previous statements of Government witnesses, defense must show inconsistency between the testimony of the witness and the contents of statements sought to be produced and moreover that such inconsistency must even be shown by defense counsel to exist as a prerequisite to securing the court to read the statements to determine if any such inconsistency exists.

(2) Whether the Court of Appeals was correct in designating the trial court's concededly erroneous ruling as "harmless error" because of the enactment of the supervening statute enacted by Congress (18 U. S. C. Sec. 3500(a)(b)(e)(1)(2)) as an aftermath of the decision of the Supreme Court of the United States *in Jencks* v. *United States* (353 U. S. 657).

(3) Whether the Court of Appeals was empowered to accept and predicate its decision on an examination in camera of a sealed summary of the prior statement of a Government witness furnished to it by the prosecution and of an ex parte affidavit pertaining to the summary, to determine whether the summary is discoverable under the provisions of Title 18 U. S. C. Section 3500, when the summary was not part of the trial record, and when no claim was asserted that the said summary contained irrelevant or extraneous matter.

(4) Whether the Court of Appeals erred in completely disregarding the contention of petitioner herein that the admitted error of the trial court, as clearly enunciated in the *Jencks* case, applied not only to the first Government witness as to whose testimony the production of a previous statement was refused but also to all the subsequent witnesses who were not asked about such statements because of the trial court's emphatic exposition of his erroneous concept of the doctrine announced by this Court in *Gordon* v. *U. S.* (344 U. S. 414).

(5) Whether Title 18 U. S. C. A. Section 3500 is unconstitutional on its face and as applied by the Court of Appeals herein and even if it is otherwise constitutional whether the Court of Appeals erred in its interpretation and construction.

(6) Whether Section 3500 is *Ex Post Facto* Legislation as applied to appellant.

Statement of Case

As an aftermath of a full-dress U. S. Senate Committee investigation complete with all the publicity and television trappings with which the nation has been regaled in recent years, the petitioner herein, together with eight other persons was charged in an indictment with a conspiracy to de-

fraud the United States Government in violation of Title 18 U. S. C. Sec. 371. The said petitioner was also charged in the second and third counts of the indictment with bribery in violation of Title 18 U. S. C. Sec. 201. Upon motion of the prosecution, a severance was ordered of the trial of three of the named defendants, including one, Joseph G. Porreca, a Government inspector who pleaded guilty and testified as a prosecution witness.

After a lengthy trial (six weeks), the jury rendered a verdict of guilty as charged against all the defendants except that petitioner and defendant David Pollack, a Government employee, who was charged in the second count of the indictment with accepting a bribe proffered by petitioner, were acquitted of the charges contained in the said second count. Petitioner was convicted under the first and third counts. The verdict of the jury included a request on the part of the jury for clemency as against all defendants. On May 15, 1957, petitioner was fined $1,000 on Count One of the Indictment and sentenced to fifteen months imprisonment on each of Counts One and Three, the same to run concurrently.

The offenses of which the defendants were convicted were alleged to have been committed in connection with procurement contracts for garrison hats for the U. S. Army Quartermaster Corps and white sailor hats for the U. S. Navy. The white hats were manufactured in Puerto Rico. The defendants were all men of previously unimpeachable honesty and integrity. Not one had ever been convicted or even accused of any previous offense. The principal Government witness was Leon Levy, an unindicted accomplice, who glibly and fearlessly testified to having participated in the commission of many crimes during his tenure of occupancy of the witness chair. He was shown to be a former business associate of defendants Rubin and Ades embittered because he had not been included in the subsequent business activities of his erstwhile associates.

The testimony of the defendant Porreca, the Government inspector who pleaded guilty prior to the trial and testified for the prosecution, was without doubt the evidence which tipped the scales against the defense. In his testimony before the Senate Committee and during the trial, he perjured himself almost endlessly. He frankly admitted he had perjured himself before the Senate Committee on cross-examination. For his assistance to the prosecution, he won a suspended sentence.

Both Leon Levy and Porreca had undoubtedly given and signed statements to several federal law enforcement agencies. Such statements would have been invaluable to defense counsel on cross-examination of these two self-confessed rogues. Request was not made for such statements because of the emphatic ruling of the trial Judge Hon. Irving Kaufman during the testimony of the first real witness called by the prosecution after some introductory testimony by an expert witness.

At the first opportunity, after the direct testimony of this witness, Melvin Carlin, an accountant, Mr. Rubin's counsel, Mr. John T. Sullivan, inquired whether a statement had been given by the witness to any Government Investigator (R. 46).[1]

After receiving an affirmative reply that such a statement had been given to investigators for the United States Senate Committee, demand was made for the production of the same. The following colloquy between Court and Counsel then ensued (R. 46):

> "Mr. Sullivan: If the Court please, I ask for the production of that statement.
>
> Mr. Christy: No proper foundation for that, your Honor.
>
> The Court: I don't think you have laid any foundation merely by asking if a statement was given.

[1] References in this form are to the Transcript of Record.

Mr. Sullivan: What was your ruling, if your Honor please?

The Court: I don't think you have laid sufficient foundation for the production of the statement?

Mr. Sullivan: I would ask the Court to look at the statement to see if there are any inconsistencies?

The Court: I don't think you have even laid a foundation for that."

Immediately thereafter, in questioning the witness concerning a most important document, a $1000 check, the proceeds of which it was contended by the Government was given to Rubin for alleged payoffs, the witness testified as follows (R. 48):

"Q. Did you tell Mr. Poole and Mr. Balaban on your meeting with them the first time the Government agents talked to you that you had put that check under the category of 'Entertainment'? A. I posted it, yes.

Q. You posted it in the books yourself? A. Yes, I posted it myself.

Q. Now, did you tell Mr. Poole and Mr. Balaban that it was you who posted it under the category 'Entertainment'? A. I don't know whether I did or didn't. It is in my handwriting. If they asked me, I must have surely said that I did.

Q. When you posted that thousand dollars under the category 'Entertainment', had you looked at the checkbook of Bonita Originals, from which this check had been taken? A. Yes."

Thereafter the stub of the checkbook was put in evidence by counsel for Rubin as defendants' exhibit and the witness gave the following testimony (R. 49):

"Q. Mr. Carlin, when you made the entry of one thousand dollars, did you observe that checkbook which said that the check 2213 was an exchange? A. I did."

Thus the Government witness, a certified public accountant, was forced to admit he had made a false entry in the company's books.

Thereafter further demand was made for the statement as follows (R. 74):

> "Mr. Sullivan: If the Court please, may I address you?
>
> If your Honor please, according to the case of Gordon v. United States, 344 U. S. 414, it was my understanding having to do with the prior statement that I asked to be furnished to me, that was given to Balaban and Poole, it was my understanding that if I can tell your Honor of a specific statement, that then the rule is that you see the statement and observe if there is any inconsistency, and if there is any inconsistency, and if there is, you give it to me; am I mistaken in that?
>
> The Court: That is substantially correct.
>
> Mr. Sullivan: Well, I did ask for the specific statement given to Balaban and Poole.
>
> The Court: I know, but you didn't point out that there was any inconsistency. That is the obligation.
>
> Mr. Sullivan: I don't have to, as I understand it.
>
> The Court: Oh, yes, you do. You must at least indicate to me something that makes it appear that there might have been something inconsistent in that statement. Then I would read it over. But there wasn't the slightest indication. As a matter of fact, everything you brought out indicated that it was consistent. The mere request doesn't make it necessary for me to look at it. Otherwise the Court would be busy all day long looking at every possible document that had anticipated the case. You may show something inconsistent, because that is the only purpose upon which you could use it, or at least something that tends to make us believe that there was something inconsistent, and then the Court has an obligation to look at it.
>
> I am familiar with the entire line of cases."

Thus the Court once and for all the purposes of this trial made the far reaching ruling which effectively limited and hamstrung all defense counsel on cross-examination, exceptionally vital in this case, which turned for the most part on relatively uncorroborated verbal assertions of Government witnesses. Had counsel been able to secure the

production of previous statements by Carlin, Levy, Porreca and the other Government witnesses, the defendants might very well have been able to secure a verdict of acquittal from the jury. It is most significant that the jury during the course of its deliberations asked that the cross-examination of Carlin be read again and eventually recommended leniency after first inquiring whether leniency could be secured through them. The length of time they remained in session and their many requests for instructions all denoted a doubtful and troubled attitude on their part.

The Court made its ruling so clearly that subsequent requests for such previous statements of witnesses might very well have been deemed offensive and contumacious in the presence of the jury. If the Court had ruled properly on the law as enunciated in *Gordon* v. *United States, supra,* after counsel had expressly referred to the case, then, of course, subsequent requests for all such statements would have been in order. In such circumstances, counsel is certainly not required to indulge in repetitious requests and objections.

The Court's attention is called to the fact that the case at bar contains other manifestations of an erroneous conception on the part of the trial court as to the right of the defense to statements and documents in the possession of the Government. There were at least two matters of the same nature which were accorded the same treatment by the Trial Court. The witness Levy utilized a memorandum in Arabic to refresh his recollection. This was, of course, made available to defense counsel for their inspection but there were other memorandums or diaries also in Arabic which were in the possession of the prosecution which were not produced although counsel for the defense had in effect requested that they be turned over to defense. The colloquy between the Court, Mr. Christy and Mr. Gould, counsel for defendant Lev (CA 55-57)[2] amounts to a request for these

[2] References in this form refer to the certified transcript of record in the Court of Appeals.

diaries and a refusal by the Court at the time of the request to turn them over. The Court stated as follows:

> "The Court: Very well, that apparently is it at the present time. There will be no direction 'now to turn' over all of them. If during the course of the trial it becomes apparent the other notes are important, then I will rule on it at that time." (The stenographer's minutes read "out of turn" but obviously the Court said "now to turn".)

The Court further stated (CA 53):

> "The Court: Whether or not you will be able to see any other part of the notes is another problem.
> Mr. Gould: Will depend on the state of cross-examination.
> The Court: That is correct.
> Mr. Gould: Very well, sir. I understand it very clearly.
> The Court: That will depend upon the state of the law."

Necessarily the request of counsel for the other Arabic notes utilized in the Senate investigation was based on even stronger and more compelling grounds than the request for Carlin's statement. Under no conceivable rule of governmental privilege could the Court have refused to direct the turning over of these memos or even to have deferred ruling on same.

The same pattern was followed as to the minutes of the Senate Committee. The record of the public sessions in book form was distributed throughout the country to anyone asking for them; but the minutes of the closed or executive sessions were not made available to defense counsel. On the occasion when the Government made an offer of proof as to the testimony of defendant Pollack before the Senate on the theory of consciousness of guilt the Assistant District Attorney stated as follows (CA 59-60):

> "We have provided defense counsel, at least Mr. Carroll, with a copy of the *Executive Testimony* of

> David Pollack from which testimony we wish to introduce certain parts, * * *." (Emphasis supplied.)

Thereafter Mr. Carroll, counsel for Pollack, stated:

> "Mr. Carroll: I have examined the seven pages of *selective quotation* which Mr. Christy submitted to us at the close of the last session, * * *." (Emphasis supplied.)

Apparently the Government did not even furnish the full context of the portions of the executive testimony from which they proposed to read excerpts. It is submitted that these prejudicial actions of the prosecution stemmed from the original ruling of the trial court during the Carlin testimony.

Of course there cannot be the slightest doubt that under the doctrine of *Jencks* v. *United States, supra,* decided shortly after this trial ended, the conviction of Rubin on both counts would have been reversed had it not been for the supervening enactment of Title 18, U. S. C., Sec. 3500 (a)(b)(c)(1)(2). In this connection, the opinion of Chief Justice Clark of the Court of Appeals stated as follows:

> "* * * Since the decision in Jencks v. United States, 353 U. S. 657, we know that the trial judge was in error in refusing the order on the ground that the defendants had not established inconsistencies between the statement and the witness' testimony. But before a new trial is to be ordered, we must see if the statement is in any event discoverable. * * *" (R. 85)

Thereafter the distinguished Chief Judge asserted that the United States Attorney had furnished the Court in a sealed envelope from the Senate Commitee, a Senate investigator's summary of an interview with the witness Carlin, accompanied by an affidavit which, to use Judge Clark's word "establishes" that the summary submitted is the only written record made of Carlin's interview and that it was written following the interview and is not a substantially verbatim record of Carlin's statement.

Judge Clark then goes on to state that while defendants "may perhaps" have been given a right to inspect a statement of this nature by the Jenck's decision, the recent codification of discovery on this situation would not allow petitioner the right to examine the investigator's summary on a new trial and therefore the error is rendered harmless by the supervening statute.

There is not a single word in the opinion of the Court of Appeals which in any way disposes of the petitioner's contention that his defense was hampered and prejudiced from that point forward by the trial court's error which the Court of Appeals apparently holds would have required a reversal as to Rubin were it not for the enactment of the new Statute.

A consideration of the foregoing excerpts from the record of the trial will demonstrate beyond any doubt to anyone even casually familiar with Government investigative agencies and procedures that regardless of whether the Senate investigator or the witness Carlin is telling the truth as to the existence of a statement signed by Carlin, there are statements in existence as to other and more important Government witnesses which will certainly prove to be relevant and inconsistent with trial testimony judged by any standard and therefore available to petitioner under the new Statute on a second trial.

Moreover, the Court of Appeals in reaching out beyond the record of the trial as to the statement of the witness Carlin did not carry this concept of appellate procedure to its logical ultimate and insist that prior statements respecting the testimony of all government witnesses be furnished to them in their deliberations for consideration and comparison with the trial testimony of such witnesses to ascertain whether any of such statements would have been discoverable under the new statute.

Summary of Argument

(1) The trial court's ruling as to the production of existing previous statements of Government witnesses constituted reversible error.

(2) The Court of Appeals erroneously interpreted Section 3500, Title 18, U. S. C. in its decision.

(3) The Court of Appeals lacked authority to predicate its decision on documents which were not part of the trial record.

(4) The Court of Appeals erred in completely disregarding petitioner's contention that the trial court's conceded error applied to all Government witnesses, even though production of previous statements as to them was not requested.

(5) Title 18, U. S. C., Section 3500 is unconstitutional on its face and as interpreted by the Court of Appeals herein.

(6) Section 3500 is Ex Post Facto legislation as applied to Appellant.

I

The trial court committed reversible error in ruling during the testimony of the first important government witness that previous statements of government witnesses shown to be in existence need not be produced unless defense counsel demonstrated an inconsistency between the testimony given by the witness on direct testimony and the contents of the statement sought to be produced.

The initial testimony in this lengthy trial was furnished by witness Rooney as an expert on procurement regulations and procedure; but the trial really started with the testimony of Melvin Carlin, a former accountant for

the Bonita Originals Company, which was owned by defendant Maurice Ades and government witness Leon Levy. Carlin furnished the cornerstone of the Government case. He was a most important prosecution witness.

On cross-examination by trial counsel he was asked the questions set forth above under Statement of the Case and the ruling complained of was made by the Trial Judge as likewise indicated hereinbefore. It is most important to understand that this ruling was made virtually at the outset of the prosecution's case at the first opportunity presented to counsel to do so and the Court once and for all the purposes of this trial made the far reaching ruling which effectively limited and hamstrung all defense counsel on cross-examination, exceptionally vital in this case which turned for the most part on relatively uncorroborated verbal assertions of Government witnesses. Had defense counsel been able to secure the production of previous statements by Carlin, Levy, Porreca and other prosecution witnesses the defendants might very well have been able to secure a verdict of acquittal from the Jury. It is significant that the Jury during the course of its deliberations requested that the cross-examination of Carlin be read to them and eventually recommended leniency, after first inquiring from the Trial Judge whether leniency could be secured through them. Additionally, the length of time they remained in session and their many requests for instructions all denoted a doubtful and troubled attitude on their part. The denial of production of these statements and the consequent limitation of cross-examination improperly imposed, could certainly never be categorized as "harmless error" in this close case.

In any event there can be no doubt that the court's ruling constituted reversible error under the doctrine of *Jencks* v. *United States, supra;* but absent this Court's decision in the *Jencks* case, which was handed down about

one month after the verdict of the jury herein, it is respectfully submitted that the trial court was completely in error in ruling that defense counsel were under an obligation to point out an inconsistency between the statement sought and the direct testimony of the witness as a prerequisite even to securing the reading of the statement by the court. *Gordon* v. *United States, supra.* See also *United States* v. *Andolschek,* 142 F. 2d 503; *United States* v. *Beekman,* 155 F. 2d 580; *United States* v. *Reynolds,* 345 U. S. 1, 97 L. Ed. 727; *United States* v. *Krulewitch,* 145 F. 2d 76.

The writer as trial counsel who carried the heaviest burden during this lengthy muliple-defendant conspiracy trial, as the record of the trial will well demonstrate, finds himself at a loss for words to adequately describe the devastating consequences to the defense which ensued as a result of this ruling. The error permeated and tainted the entire trial from that point forward. It was never doubted by defense counsel that all Government witnesses had each supplied numerous and conflicting statements to the various law enforcement and investigative arms of the Government in this widely publicized situation. When the court announced its ruling that it would be necessary to demonstrate an inconsistency before the court would even look at a document, it is putting it mildly to state that consternation filled the hearts of the various veteran counsel for the defense in contemplating how to devise a means to show an inconsistency in a paper no one had seen or could ever see.

The conviction of Rubin ought to have been reversed by the Court of Appeals under the above cited authorities even without reference to the *Jencks* case which preceded the latter. The subsequent enactment of Title 18, U. S. C. Section 3500 did not cure the vice in the court's erroneous ruling because under the provisions of that statute it would have been mandatory for the court to order the production of the prior statement in the circumstances presented at the trial.

II

The Court of Appeals erroneously interpreted Section 3500, Title 18 U. S. C. in holding that the trial court's conceded reversible error became "harmless error" because of the enactment of this supervening statute.

Even the limited clues we have as to the substance of the report agents Balaban and Poole of the Senate Permanent Subcommittee on Investigations, the so-called McClellan Committee, made after their interview with the witness Carlin in June of 1952, indicate that the report is one which should be made available to the defense on a new trial, in accordance with a realistic interpretation of the provisions of Section 3500.

The affidavit of Jack S. Balaban, the investigator, sworn to April 4, 1958 and attached as Exhibit B to the Government's brief on the appeal from the conviction of the defendants in the District Court which was heard in the Court of Appeals on April 29, 1958 shows clearly that the statement or memorandum which was prepared by Balaban following the interview with Carlin in June of 1952 pertained to the subject matter of Carlin's direct testimony as a witness for the U. S. Government; that it was made at least partially on the basis of oral statements made by Carlin to Balaban and that the statement was prepared or recorded contemporaneously as that word is understood when applied to government investigative procedure. The circumstance that Balaban states in his affidavit that the statement or memorandum is not a substantially verbatim recital of an oral statement by Carlin seems fatuous and lacking in candor. It would be almost impossible to conceive that his report after such an interview would not contain some quotation as to what Carlin had said to him orally.

The Court's attention is invited to the somewhat equivocal language employed by the Court of Appeals in describing the statement after having had the opportunity to read the same. The court stated first that Balaban's affidavit "establishes" that this summary is the only written record made of Carlin's interview and is not a substantially verbatim record of Carlin's statement. In our opinion, Balaban's gratuitous statement to such effect contained in his affidavit "establishes" nothing insofar as determining whether or not this document can be suppressed by the Government on a new trial under the provisions of Section 3500.

After the foregoing reference to Balaban's affidavit, the Court below then stated further:

> "We have examined the summary and *internal evidence* from it *tends* also to bear this out" (emphasis supplied).

It is submitted that if the so-called "internal evidence" from the document simply "tends" to bear out the investigator Balaban's inexpert interpretation of what Congress intended and meant by the term "substantially verbatim recital of an oral statement made by a witness to an agent of the Government" then the defense ought to be entitled to the benefit of the doubt and given the statement together with a new trial.

There can be little doubt but that the Court of Appeals has adopted an unwarrantedly narrow and technical interpretation of Section 3500. It is most significant that nowhere in the opinion of the Court of Appeals can there be discerned any intimation that the statement was not relevant and germane to the testimony adduced on direct examination of the witness or that it was not inconsistent with such testimony.

It is wholly illogical to suppose that Congress intended the hypertechnical and narrow interpretation which the

Court of Appeals has placed upon the term "substantially verbatim recital". According to the avowed intentions of the framers of the legislation, Congress was seeking to prevent a wholesale raid upon the confidential files of the law enforcement and investigative agencies which was feared because of a misconception of the doctrine of the *Jencks* case. It was piously avowed by them that it was not the intention of Congress to "nullify or, to curb or to limit" that decision. Similarly, it was surely not the intention of Congress to invade the sacrosanct territory of "due process" by pointlessly depriving an accused of a fair trial and the full right to impeach his accusers on cross-examination through the use of statements made or signed by the witness himself or otherwise recorded by an investigator. The tests must be what did the witness say to the investigator at that time and did the investigator record all or part of it in some fashion contemporaneously or at or about the same time as the interview. If the remarks of the witness were relevant and tending to be inconsistent and if the investigator's record manifests the same, all or in part, or directly or indirectly, then counsel for the defense should be given the statement for impeachment purposes and to bring out the real truth on cross-examination. In *Berger* v. *United States*, 295 U. S. 78 at page 88, Mr. Justice Sutherland in referring to the Government's status in a criminal prosecution stated:

> "* * * and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The term "substantially verbatim recital of an oral statement" was not employed to prevent or prohibit the attorney for the accused from securing and using records of what the witness himself actually said previously, but to prevent useless and dangerous disclosure and dissemination of the inner files and workings of our trusted law enforcement agencies. Any other interpretation would

have the effect of nullifying the statute on the grounds of unconstitutional invasion of the right of due process. It certainly cannot be inferred that Congress intended to make a travesty of the *Jencks* decision and indirectly prohibit that which it purports to confer on the defense by the statute, i.e., the right to the use by the defense on cross-examination of prior statements of Government witnesses, by encouraging overzealous or unscrupulous investigators to phrase their reports so that no statement will fit within the narrow compass of the definitions in Section 3500 as the same has been expounded by the Court of Appeals in its opinion in the case at bar.

The case of *United States* v. *Miller*, 2 Cir., 248 F. 2d 163, certiorari denied *Miller* v. *United States*, 355 U. S. 905, cited by the Court of Appeals in its opinion in support of its interpretation of Section 3500 constitutes no precedent bearing on our problem because the issue was eliminated from the record on appeal by stipulation. In paragraph 2, page 165, the *Per Curiam* opinion states as follows:

> "Hence subdivision (c) of the new statute, 18 U. S. C. § 3486(c), will apply, and it will be the duty of the trial judge to 'excise the portions of such statement which do not relate to the subject matter of the testimony of the witness,' and 'With such material excised, the court shall then direct delivery of the statement to the defendant for his use.' We shall assume that Judge Walsh's failure to follow such procedure was an error but we cannot determine whether or not it was a prejudicial error because the exhibit has by stipulation been excluded from the record on appeal. *Since we cannot know that failure to deliver the statement, properly excised, was prejudicial to the defendant, we do not think a new trial should be ordered.*" (Emphasis supplied)

The Solicitor General of the United States in his brief opposing the granting of certiorari herein cited as authority for the proposition that the trial court's mistake was merely "harmless error", the case of *United States* v. *Sheba*

Bracelets, Inc., 248 F. 2d 134 (C. A. 2) certiorari denied 355 U. S. 904. Here again we have an authority which has very little if anything to do with the issues raised by this appeal. In the *Sheba* case it was clear that there was no inconsistency between the reports and the testimony. In paragraph 8, page 145 the Court's opinion states as follows:

> "It will be recalled that the testimony was that on each of those seventeen days Carroll went through precisely the same movements in the delivery of the gold. It is difficult to see that the use of these reports on cross-examination would have accomplished anything other than a demonstration that Newbrand had written in his reports the same thing to which he testified at the trial."

Again in paragraph (9), page 145 of the same decision, a further reason for invoking the "harmless error" statute is supplied by the court as follows:

> "But it is abundantly clear that any error in refusing to hand them to defense counsel was a harmless one which cannot, under any circumstances, have affected the substantial rights of the defendants. This is so because the evidence of the guilt of the defendants was simply overwhelming. In the six months period April through September, 1951, Carroll on 94 different days purchased approximately 150 ounces of fine gold from the refiners. This was established by the production of 94 end-use certificates, including the two described in the indictment, from the records in the office of Kastenhuber & Lehrfeld."

In the instant case there is no contention asserted that the investigator's recording of the statement of the witness could not be deemed inconsistent and certainly by no stretch of the imagination could it be declared that the evidence of the guilt of the defendants was overwhelming. To the contrary, it is almost unbelievable that twelve men and women could have been found who would vote to destroy the lives

of five people of previously unassailable character and reputation on the basis of the type of testimony which was adduced herein by the prosecution. As has been stated before the length of time during which the jury deliberated, their many requests for instructions and their recommendation of clemency denoted a troubled and doubtful frame of mind.

In *United States* v. *Grunewald*, 162 F. Supp. 621, Judge Herlands of our Southern District of New York seems to embrace the proposition that an investigator's report of previous oral statements of Government witnesses can be quarantined from any use by defense counsel for impeachment purposes on cross-examination through the very simple device of setting it up on department records as an inter-office communication and utilizing the magic words "to" and "from". Such an interpretation would nullify Section 3500 as an invasion of due process. Reference is made by Judge Herlands in his opinion paragraph (2), page 624, to the views expounded by our distinguished Judge Frederick V. P. Bryan in a District Court decision handed down in our companion certiorari case herein. *United States* v. *Palermo*, D. C. S. D. N. Y. 1957, 21 F. R. D. 11, 13-14. Certainly Judge Herlands cannot contend that Judge Bryan intended to assert that experienced defense counsel could not find ways and means to use an investigator's report of a previous oral statement of a Government witness inconsistent with his testimony merely because the paper was not signed by the witness.

In *Bergman* v. *United States*, 253 F. 2d 933, the Court of Appeals for the Sixth Circuit reversed the conviction of the defendant on the basis of the *Jencks* decision in a case substantially the same as the case at bar. The court stated in paragraph (3), page 935 as follows:

> "Several months after the judgments of conviction were entered, the Supreme Court decided Jencks v. United States, 1957, 353 U. S. 657, 77 S. Ct. 1007, 1

> L. Ed. 2d 1103. In that case the Court expressly disapproved the procedure adopted by the district court here. 353 U. S. at page 669, 77 S. Ct. at page 1013. In the light of the Jencks decision, the failure of the district court to make Chitwood's prior statement available to the defense requires that the judgments be set aside. We reach this conclusion with reluctance in view of the likelihood that the failure to make Chitwood's statement available actually worked no prejudice to the defendants, and in view of the generally conscientious and fair conduct of the long and complicated trial by the district judge."

The footnote to Judge Stewart's opinion, page 935, reads as follows:

> "The fact that Chitwood's statement may have been unsigned is immaterial, if it was 'otherwise adopted or approved by him,' or, if orally made, it was a substantially verbatim contemporaneous recording. Jencks v. United States, 353 U. S. at page 668, 77 S. Ct. at page 1013; 18 U. S. C. A. § 3500."

The Court's attention is invited also to *Lohman* v. *United States*, likewise a Sixth Circuit decision which was also written by Mr. Justice Stewart of this Court while a Judge of the Court of Appeals. See also *U. S.* v. *Rosenberg*, U. S. D. C., E. D. Pa., 157 F. Supp. 654.

In conclusion, it should be stated that the general language of Section 3500 presents an extremely difficult problem of interpretation for trial and appeal courts. Section 3500 makes no provision as to how it is to be determined whether a particular document is or is not a "statement" as defined in subsection (e). Moreover, subsection (e) imposes a rigorous definition on the meaning of the word "statement" for production purposes under subsections (b) and (c). On its face, subsection (e) contains numerous words and phrases with vague and indefinite connotations. To begin with, it is first necessary to decide what is "the subject matter as to which the witness has

testified", as provided in subsection (b), before it can be determined whether a "statement" as defined by subsection (e) should be produced pursuant to subsection (b) or subsection (c), as the case may be. Only after it is determined what the "subject matter" is, can it be determined whether a "statement" relates to the "subject matter". But even a "statement" relating to the "subject matter" need be produced only if it meets the requirements of subsection (e). In that determination, these questions present themselves. If the statement is a written statement made by the witness but has not been signed by him, has he otherwise adopted or approved it? If the statement was recorded by a government agent on the basis of an oral statement made by the witness, there are two questions. Is the record "a substantially verbatim recital" of the witness' oral statement? Was it "recorded contemporaneously" with the making of the oral statement? These questions have no simple or obvious answers and reasonable and honest men may differ as to their answers.

III

The Court of Appeals exceeded its authority in accepting and predicating its decision on documents which were not part of the trial record and which contradicted the testimony of the Government's own witness.

It should be understood at the outset that no claim has ever been made that the statement whose suppression at the trial has been approved by the Court of Appeals because of the subsequent enactment of Section 3500, contained irrelevant or extraneous matter. No assertion has ever been forthcoming that there were no inconsistencies between the witness' testimony and the statement. The statement was not perused by the trial court and was never produced at

all until it was submitted to the Court of Appeals in a sealed envelope accompanied by an *ex parte* affidavit of the government investigator characterizing it as not a "substantially verbatim recital of an oral statement made to an agent of the Government." The Trial Judge who had studied and prepared for the trial by a series of pre-trial conferences and otherwise; who had presided over the selection of the jury, listened to the opening statements of counsel and heard and observed the witness closely throughout the direct examination, was the one who should have read the statement and set forth in the record his reasons for whatever decision he felt constrained to render. Instead we have the Court of Appeals perusing the paper in question in conjunction with a document which would have been completely incompetent at the trial, an investigator's affidavit, which amounted in effect to an interpretation by the inexpert investigator as to the significance of the definitive part of Section 3500. Surely defendants' counsel would never have been permitted to add incompetent affidavits to the record on appeal to support its contentions. Can it be that we have now reached a new stage in the evolution of the rules of evidence whereby a different set of standards is to be applied to favor the prosecution at the expense of the defense in criminal trials and appeals?

Clearly the opinion of the Court of Appeals is not susceptible of misunderstanding. It was the incompetent affidavit of the investigator which "established" that the report is not a "substantially verbatim" record of Carlin's statement (R. 85). The summary itself "*tends also* to bear this out" (emphasis supplied).

It is especially significant for this Court to fully comprehend just exactly what did transpire during the cross-examination of the witness Carlin by defendant Rubin's counsel. The witness was asked "when is the first time you gave a statement to any Government agency concerning the events that you testified to here this morning." The

District Attorney promptly objected on the grounds that no foundation had been shown even to ask the question (R. 45) and he was overruled. Then the witness stated in response to further questioning by Mr. Sullivan that he had given a statement concerning the events to which he had testified to the Senate investigators Balaban and Poole and he said he believed he had signed a statement (R. 46).

Immediately thereafter request was made for the production of the statement (R. 46). It should be carefully noted that what was requested was a statement signed by the witness Carlin which counsel had every right to believe existed by virtue of Carlin's responses to his questions. It is most significant that the District Attorney did not state that he was unaware of the existence of such a document; he merely objected on the ground that "no proper foundation" had been established (R. 46). In his affidavit which was submitted to the Court of Appeals together with the sealed summary and the affidavit of investigator Balaban, referring to the demand for the statement, he stated as follows:

> "At the time such demand was made, your deponent did not have in his possession any signed statement by witness Carlin nor any report of an interview of Carlin by Senate investigators: nor was your deponent aware that there was in existence either a signed statement or a report of an interview." (R. 75)

Thereafter Mr. Sullivan again sought the production of the statement which he believed and had every reason to believe was in being and reposing in the prosecution's file and the court delivered itself of his conception of the rights of the defense to such statements which we now know was definitely erroneous under the *Jencks* case at least (R. 74).

If the prosecutor had advised the court and Rubin's counsel that he had no such statement as the one which the witness had testified he gave and signed to agents Balaban and Poole, then resort would have been had to ques-

tioning further government witnesses as to other prior statements to at least secure a clean cut decision on the issue from the Trial Judge. Counsel was surely justified in believing that he had been given just that clean cut decision to which he was entitled. He could not have continually plagued the court with identical requests for the ruling which he had already received—a most definite and unequivocal ruling with no strings attached and susceptible of no misunderstanding.

Now by virtue of the avoidance of the issue, to some extent, by the prosecutor by his having argued the proposition as if a signed statement existed, when according to his affidavit he knew of no such document, the defendant Rubin finds himself in the position of having been deprived of his right to the production of prior statements of Government witnesses during the trial and also deprived of his right to a judicial review of the trial court's ruling on appeal because of a legerdemain so to speak. In effect, the Court of Appeals says—you thought you had a ruling on the issue but you really did not because what you thought was there was really not there. Since it was affirmative Governmental action, whether intentional or unintentional which constructed and produced the trap—the completely unfair predicament into which Rubin and his lawyer fell, it is earnestly urged that on these grounds alone a new trial should be ordered as to the defendant Rubin. He was in effect deprived of a fair trial according to due process of law, according to the rule of the *Jencks* case and according to the provisions of Section 3500; then to cap the climax he finds that he has been maneuvered out of a straightforward decision on appeal as to his right to a fair trial under the Sixth Amendment to the Federal Constitution, with full rights of confrontation and cross-examination. In no way did he or his counsel contribute negligently or otherwise to the kettle of fish from which he is now attempting to extricate himself in this court.

In fairness it must be stated that under no circumstances is there any implication intended that Mr. Arthur Christy, the prosecutor planned or deliberately created the unhappy situation which has arisen in this connection.

The rule of law that an appellate court may, on appeal, consider documents which are not part of the record of a trial is carefully limited in its scope. The rule is definite and clear that only *incontrovertible documents may be so received.* (*O'Connor-Sullivan, Inc.* v. *Otto*, 283 App. Div. 269, 127 N. Y. S. 2d 373 at page 377; Vol. 6 Carmody's New York Practice Sec. 316; *Latourelle* v. *New York Central Railroad Company*, 275 App. Div. 123, 89 N. Y. 2d 296.)

In *Stemmler* v. *The Mayor of New York*, 176 N. Y. 476 at page 483, the rule is limited to the reception of record evidence. *People ex rel. Warschauer* v. *Dalton*, 159 N. Y. 235, 239; *Wines* v. *Mayor, etc. of N. Y.*, 70 N. Y. 613; *Matter of Cooper*, 93 N. Y. 507; *Day* v. *Town of New Lots*, 107 N. Y. 148; *Dunham* v. *Townsend*, 118 N. Y. 281; *Atlantic Ave. R. R. Co.* v. *Johnson*, 134 N. Y. 375.

The public documents such as deeds or mortgages or records of a permanent public office engaged in a usual routine of business would appear to be the type of document permitted to be perused under the holdings of the cases. Certainly the summary and the affidavit described by the Court of Appeals in its opinion fall far short of any compliance with these standards. The Senate Committee is not in any sense a permanent continuing body of the nature of a County Clerk. Furthermore, only an ostrich could immunize itself from the unvarnished truth that the chairman, counsel and investigators of the Committee are not disinterested parties. In fact, the Committee's counsel has on occasion expressed criticism of the Attorney General of the United States for his failure to indict and convict on cases referred to him by them. They want convictions to support their proceedings and pronouncements.

The Court of Appeals clearly had no right under the rule to consider the summary and the affidavit submitted to them by the U. S. Attorney in their deliberations. Many unwarranted inferences and conclusions must necessarily be implied and speculated upon from these documents before the sworn testimony of the Government witness is overcome and the conclusions of the Court of Appeals that the summary is the only written record of Carlin's interview and would not be discoverable under the new statute, can be accepted.

IV

The Court of Appeals erred in completely disregarding petitioner's contention that the trial court's erroneous ruling on the production of previous statements limited the cross-examination as to all subsequent witnesses.

In announcing its ruling that counsel for the defendants would have to demonstrate something inconsistent between the testimony of the Government witness and the statement sought to be produced before he would as much as read the statement for which request was made, the trial court shackled defense counsel with chains and irons from which no escape was possible. How were they to be expected to point out an inconsistency in a paper they had not seen and could not see? The proposition is exceptionally well stated in the *Jencks* case at pages 667 and 668:

> "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in Gordon, the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing

> of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected."

We were completely and effectively foreclosed from even referring to previous statements on cross-examination of all Government witnesses. If we were to ask whether the witness had given any prior statement and receive an affirmative response, our only recourse at such a point would be to inquire whether such a statement was inconsistent with the testimony which had been given. Inasmuch as we could not possibly anticipate a response that it was inconsistent it surely would have been foolhardy for any of us to thus assist the prosecution in the conviction of the defendants. To have asked such questions in the face of the sweeping nature of the ruling which had been imposed upon us would have been quixotic and unwise. Moreover, we had already suffered in the estimation of the Jury by having our earnest request and argument disposed of so completely and adversely. Repeated and subsequent requests might very well have been interpreted as contumacious and disrespectful to the court.

There can be no doubt whatsoever but that trial court's erroneous ruling permeated and tainted the entire trial with error and injustice from the moment it was made down to the last word of testimony of the final witness. The limitation of confrontation and cross-examination which was thereby accomplished in the prosecution's behalf by the trial court was devastating to the hopes we had nurtured of impeaching the Government witnesses and extracting the real truth from their own lips through the medium of the numerous and conflicting statements, we had reason to believe had been supplied by these self-confessed criminals and perjurors to the various Government agencies which had come into the matter after the initial burst of notoriety and publicity supplied by the McClellan Committee in its first real production over the television cameras.

On a new trial, the Government would be forced to produce, for the trial court's inspection and for use by defense counsel, previous statements made by the two principal witnesses, Leon Levy and Joseph Porreca. Levy, the unindicted, self-confessed criminal, undoubtedly gave many statements to federal law enforcement agencies. Porreca, the chief inspector who bought his freedom from incarceration by his testimony, may very well have purchased his emancipation from many other prosecutions by his testimony if the truth could be brought out on cross-examination. He had the effrontery to testify that although he has supervised numerous other contracts as to the vital inspection and acceptance, this was the only time he ever received anything. Furthermore on a new trial, the Government would be forced to produce the full minutes of the closed sessions of the Senate Committee and the full text of the Arabic diaries which were not given to defense counsel at the trial.

In *Elenkrieg* v. *Siebrecht*, 238 N. Y. 254, 263; 144 N. E. 519, the late Chief Judge Frederick Crane of the Court of Appeals of New York stated:

> "It was not necessary for the defendant's counsel to except to the judge's charge in order to preserve the force and effect of his exception taken to the denial of his motion made at the end of the case. * * * One exception upon the same ruling was as good as two."

See also *Stephens* v. *Ely*, 162 N. Y. 79; 56 N. E. 499. Note: Need not repeat same objection. *Church* v. *Howard*, 79 N. Y. 415, 421; per Miller, J. See *Sherman* v. *Delaware etc.*, 106 N. Y. 542; 13 N. E. 616.

In *Kansas City Southern Ry. Co.* v. *Jones*, 241 U. S. 181, 183; Mr. Justice McReynolds stated as follows:

> "In such circumstances it was unnecessary to go through the idle form of articulating the obvious. If timely objection upon the ground ultimately suggested by the Supreme Court had been sustained, it could have been easily obviated. * * * "

In *Brettman* v. *Braun*, 37 Ill. App. 17, 18, Gary, P. J. used the following language:

> "It is not really necessary that the court shall commit the same error more than once in the same case, to bring it before a court of appellate jurisdiction for review."

If the Court of Appeals saw fit to read and consider the prior statement of Carlin which was not marked as an exhibit or even brought into court, as the affidavit of the prosecutor affirms, and to also read and give weight to the wholly incompetent affidavit of investigator Balaban, why did it stop at this point? As a logical extension of such appellate procedure, the Court of Appeals might very well have sought out, with the assistance of the prosecution, all prior statements given to all Government agencies by all the Government witnesses who undoubtedly would have been interrogated as to their previous statements but for the trial court's erroneous ruling. Thereafter an effort could have been made by the Court of Appeals to determine relevance and possibly inconsistencies with trial testimony to ascertain whether the prior statements could be deemed to be discoverable under Section 3500 on a new trial.

Such unorthodox activity on the part of the distinguished jurists who adorn the United States Court of Appeals for the Second Circuit is of course unthinkable. It is merely projected to spotlight the complete unfairness to the defendants of the proceedings which the Court of Appeals adopted in accepting and considering the incompetent affidavit of Balaban as evidence in determining an appeal which involved the lives and freedom of five citizens of previously unassailable honor and integrity. Perhaps we must take some short cuts in dispensing justice in this changing world, on matters relating to property, money or other forms of wealth but never where the honor and freedom of the individual citizen is concerned.

V

Title 18, U. S. C., Section 3500 is unconstitutional on its face and as interpreted by the Court of Appeals herein.

As a consequence of a general misapprehension of the rule announced by this Court in the *Jencks* case and because of incorrect and distorted public exposition of the doctrine by individuals who might have been expected to know better, there was rushed through the national legislature the statute designated as Section 3500 Title 18 U. S. C.

Subsection (a) provides that no statement or report in the possession of the United States which was made by a Government witness or a prospective Government witness shall be the subject of a subpoena, discovery or inspection until the said witness has testified on direct examination in the trial of the case.

Subsection (b) provides for the turning over of such statements providing they conform to the definition of Subsection (e) and are relevant to the subject matter of the testimony in their entirety. Subsection (c) provides machinery for inspection of the statement by the court, if the prosecutor refuses to turn over the statement on the grounds of total or partial irrelevancy and for the excising by the court of such parts as it deems are in fact irrelevant. Subsection (d) permits the court to either strike from the record the testimony of the witness or to declare a mistrial if the Government declines to produce and deliver over the statement.

A. Subsections (c) and (e) of Section 3500 Violate Due Process.

Subsection (c) modifies the rule in *Jencks* by providing that if the prosecution claims that a statement of a witness "contains matter which does not relate to the subject mat-

ter" of his testimony, the statement shall be produced to the court *in camera* instead of directly to the accused. *Jencks* did not define what is a "statement" or "report" of a witness. Subsection (e) defines "statement" in a restricted, arbitrary, and unreasonable manner. If it is a written statement of the witness, subsection (e) requires it to be "signed or otherwise adopted or approved" by him. If the witness made an oral statement to an agent of the government, subsection (e) requires that the recording or transcription be "a substantially verbatim recital" of the witness' oral statement and that it must have been "recorded contemporaneously with the making of such oral statement".

1. Whether the procedure set forth in subsection (e) violates due process turns on the interpretation of the *Jencks* decision. If the basis of the decision is due process, then subsection (e) violates due process.

In *United States* v. *Spangelet*, 27 L. W. 2063, the Second Circuit has recently held that *Jencks* does not rest on due process, but is an exercise of the supervisory power of the Supreme Court over the administration of justice in the federal courts. *McNabb* v. *United States*, 318 U. S. 332, 340-342. Unfortunately, the opinion in *Spangelet* deals with the problem in cursory fashion, saying only that the Court finds "no indication in *Jencks* that the standards it set forth were constitutionally required" (*ibid.*).

We believe, however, that *Jencks* does rest on due process considerations. The opinion does not refer to the *McNabb* doctrine at all. Aside from that, examination of the opinion in *Jencks* shows that the conclusion in the case stemmed from the Court's conceptions of fair play and elementary justice. "Justice requires no less" than to permit the accused "to inspect the reports", 353 U. S. at 668-669. It is "unconscionable", said the Court, quoting the *Reynolds* case, 345 U. S. 1, 12, for the government to prosecute and "then invoke its governmental privileges to

deprive the accused of anything which might be material to his defense. * * * ", 353 U. S. at 670-671. In his dissent, Mr. Justice Clark makes the derisive comment that what the majority has done, has been done: "All in the name of justice", 353 U. S. at 682. The Court of Appeals for the District of Columbia Circuit rested its conclusion in *Communist Party* v. *Subversive Activities Control Board*, 254 F. 2d 314, that *Jencks* applies to administrative proceedings on "simple justice" and "the fundamentals of fair play" (at 328):

> "We think simple justice, the fundamentals of fair play, require no less. The opinion of the Supreme Court in the *Jencks* case, as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done."

Procedural due process "is a conception of fundamental justice". *Foster* v. *Illinois*, 332 U. S. 134, 137. Cf. *Rochin* v. *California*, 342 U. S. 165, 173. Due process bars Congress from enacting laws "that shock the sense of fair play —which is the essence of due process. * * * " *Galvan* v. *Press*, 347 U. S. 522, 530. If "justice requires no less" than the procedure proscribed in *Jencks*, subsection (c) violates due process.

2. The opinion in *Jencks* does not define "report" or "statement". The opinion does, however, describe what should have been produced in that case:

> "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F.B.I., touching on the events and activities as to which they testified at the trial." (353 U. S. at 668)

In any event, this is a problem which, under the circumstances of the case, was moot in *Jencks* because it was

obvious that the statements in question were relevant and the Court needed to address itself only to the problem which was presented, the problem of production.

Whether or not *Jencks* is based on due process, the limitations imposed by subsection (e) of Section 3500 do violate due process. The definition of a "statement" in subsection (e) is arbitrary and irrational. If the witness wrote the statement, it should be available for impeachment. It is immaterial whether the witness signed it or otherwise adopted or approved it. That is a matter to be ruled on by the trial court when the statement is used for impeachment, or for explanation by the witness, if explanation is required, or for re-direct examination.

Insofar as a record of an oral statement of the witness to a government agent is concerned, it is also immaterial whether it is "a substantially verbatim recital". Here again, this is a matter to be dealt with on cross and re-direct examination. If only "a substantially verbatim recital" were competent otherwise, then direct testimony of a witness on a trial would be incompetent unless the witness could give "a substantially verbatim recital" of the events about which he is testifying, and most witnesses could not take the stand at all.

Subsection (e) is based on the further presumption that an oral statement is competent for impeachment purposes only if it was "recorded contemporaneously". If this were so, then the direct testimony of a police officer or government agent, from memory, as to what the accused or another person told him at the time of the crime or at some other time in the past would never be competent, and a common form of proof in criminal cases would be barred. Here again, the only rational way of dealing with the matter is the traditional one—by examination of the witness.

The basic premise on which subsection (e) rests is thus mistaken. It treats the production of statements made by

the witnesses as if they were to be produced for introduction into evidence as such, that is, as if they need to be as sufficiently authentic as, for example, in the case of past recollection recorded, *United States* v. *Riccardi*, 174 F. 2d 883, 887 (3rd Cir.), or as in the case of the Federal Shop Book Rule, Title 28, U. S. C. A., Section 1732. But the statements are not primarily for introduction into evidence but for use by counsel—if such use they seem to have—in seeking to impeach the witness. Whether they are eventually introduced in evidence depends upon the course of the interrogation and their introduction then does not turn on the degree of their authenticity. Consequently, the degree to which the statements are authentic is immaterial. All that is needed for production is some indication that the witness made the statement and that it relates to the subject matter. Whether it is used for impeachment and then for introduction in evidence does not turn on authenticity along the lines set forth in subsection (e).

Thus, for example, if the defense should happen to have a letter the witness wrote to a friend or a copy of a report made by a private investigator on the basis of an oral statement made by the witness, there is no question that the letter or the report could be used for impeachment if it seemed to have value in that respect, even if the letter were unsigned or the investigator's report were not a substantially verbatim account of what the witness had said and had not been recorded contemporaneously. The witness could of course deny writing the letter or making the statement, or he could question the accuracy, completeness, or authenticity of the documents, or he could make any other explanation or disclaimer if such were necessary. These are all matters for trial in the conventional way, as we have said, but complete authenticity of the letter or report would not have to be fully established before they were available for impeachment.

Furthermore, under the rule prior to *Jencks* and the rule unaffected by Section 3500, if such a letter or report

happened to be in the possession of the prosecution it would have to be produced on motion of the accused since Section 3500 applies only to statements made to government agents. But if the letter had been written to a government agent or the record of the witness' oral statement had been made by a government agent, production would be denied if the material did not meet the standards fixed in subsection (e).

What Congress has done in subsection (e), then, is to place statements made to government agents in a special category and to impose several technical limitations upon their use without any apparent reason except the mere fact that they were made to agents of the government. The standards fixed in subsection (e) have no relation to proper use of the statements for evidentiary purposes, to any policy of secrecy, or to any policy relating to the practical or other needs of the government or its agents. The standards in subsection (e) meet no legitimate purpose. Subsection (e) thus has no rational foundation. It is an arbitrary limitation on the right of cross-examination.

3. Congress has the power to regulate the rules of evidence in the federal courts, but the power, like all legislative power, is subject to due process. *Tot* v. *United States*, 319 U. S. 463; *Benton* v. *United States*, 232 F. 2d 341 (C. A. D. C.). The arbitrary, irrational, and unfair barriers in the path of the right of impeachment erected by subsections (c) and (e) of Section 3500 violate due process. "Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life." Mr. Justice Douglas, concurring, *Peters* v. *Hobby*, 349 U. S. 331, 351. There is no reasonable basis for the deep inroads which subsections (c) and (e) make on these essentials of a fair trial. "Mere legislative fiat" cannot be substituted for the right of the accused to defend himself in a criminal case. *Manley* v. *Georgia*, 279 U. S. 1, 6.

VI

Section 3500 is *ex post facto* legislation as applied to appellant.

1. Even if Section 3500 is otherwise constitutional, its application in this case violates the prohibition against *ex post facto* legislation contained in the Constitution, Art. I, Sec. 9, because the alleged crimes were committed before its enactment.

In *United States* v. *Papworth*, 156 F. Supp. 842 (N. D. Texas), the Court held that Section 3500 is not *ex post facto* legislation because it effects a procedural change and not a change in substantive law. But this is not what distinguishes *ex post facto* legislation. It has been clear ever since *Calder* v. *Bull*, 3 Dall. 383, that a change in procedure, whether it be in the law of evidence or otherwise, may run afoul of the *ex post facto* prohibition. One of the four types of legislation which Mr. Justice Chase included in what is the original definition of *ex post facto* laws under the Constitution is a statute which alters the legal rules of evidence. 3 Dall. at 390. And every leading case since *Calder* v. *Bull* has made it quite clear that the distinction is not between procedural and substantive changes, but between changes which affect the accused to his "substantial disadvantage" and those which do not. *Lindsey* v. *Washington*, 301 U. S. 397, 401-402. See also, *American Publishing Co.* v. *Fisher*, 164 U. S. 464; *Thompson* v. *Missouri*, 171 U. S. 380, 387-388; *Beazell* v. *Ohio*, 269 U. S. 167, 170; *Putty* v. *United States*, 220 F. 2d 473 (9th Cir.).

The question then is, as put in the *Beazell* case, *ib.*, whether Section 3500 operates "in a limited and unsubstantial manner" to the disadvantage of the accused. If it does, it is not *ex post facto* legislation. If, however, it does operate to the substantial disadvantage of the accused, it is an *ex post facto* law.

2. It is submitted that the changes in the *Jencks* rule effected by subsections (c) and (e) of Section 3500 are substantial and that this case is a vivid illustration of this conclusion.

As far as subsection (c) is concerned, this was not a case where the determination of relevancy could as easily be made by the trial judge as by the defence. The opinion in *Jencks* points out that even in the ordinary case, "only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense" and that this is why "the defense must initially be entitled to see [the reports] to determine what use may be made of them". 353 U. S. at 668-669. But this was not the ordinary case, in the sense that the problem of determining relevancy and possible inconsistency or contradiction was presented in narrow compass, as in comparing limited direct testimony dealing with a single event with only one prior statement of the witness. Even in such a case, the trial judge may overlook an obvious inconsistency or contradiction, as the trial judge did, for example, in the *Spangelet* case, 27 L. W. 2063, in comparing the witness' grand jury testimony with his trial testimony. In the instant case, the problem was considerably more complex and subtle. The witnesses Carlin, Levy and Porreca did not testify merely to one or two events or to events involving physical activities, as in *Spangelet* and as in most criminal cases. Here, the witnesses testified mostly to conversations. Thus a change in a single word or phrase in the testimony of one of the witnesses relating to one of the conversations with appellant could give the testimony an entirely different connotation, could give an incriminating meaning to an innocent comment. In such a case, then, the observation in *Jencks* that only the defense is adequately equipped to determine what is useful for purposes of impeachment is peculiarly *a propos*. In such a case, the

difference between having the trial judge examine the statements and permitting the defense to do so may well be the difference between ineffectual impeachment, on the one hand, and discrediting the witness entirely, on the other.

As far as subsection (e) is concerned, we think the case is even clearer. Under *Jencks*, appellant was entitled to *any* statement of the witnesses "touching the events and activities as to which they testified at the trial." In this case, subsection (e) had the effect of depriving appellant of material for impeachment, if, for example, it consisted of written statements of the witness which he had not signed or had not otherwise adopted or approved; or of oral statements made to government agents which were not "substantially verbatim" recitals or which had not been "recorded contemporaneously" by the agents. Without subsection (e), the prosecution would have been required to produce such statements even if they had not met these conditions, with the right to object if the statements were incompetent for impeachment on these or any other grounds. Subsection (e) deprived appellant of a substantial advantage which was available to him prior to its enactment.

3. Statutes changing particular rules of evidence have been held not to be *ex post facto* where the change is not substantial, as in *Thompson* v. *Missouri*, 171 U. S. 380, but have been held to violate the constitutional prohibition where the change makes conviction easier, as in *Frisby* v. *United States*, 38 App. D. C. 22; *Hart* v. *State*, 40 Ala. 32, and *Parker* v. *Commonwealth*, 139 Va. 585, 123 S. E. 360. But as far as we have been able to determine, there is no case passing on a problem similar to the one posed by subsection (c) of Section 3500, which does not make a change in a rule relating to the admissibility of evidence but changes the procedure whereby the accused may have access to material for impeachment purposes.

As we have said, the question is whether subsection (c) changed the situation to the substantial disadvantage of appellant. It may be that in most cases this would not be so, although the *Spangelet* case casts doubt on such a generalization. But in a case like this, where the credibility of the witnesses assumes such importance and where the use of the materials for impeachment is a complicated and difficult task, to deprive the accused of direct access to such materials is to deprive him of a substantial advantage.

Subsection (e) of Section 3500 has even more obvious effect than subsection (c). It quarantines material which was available to the accused under *Jencks* and prior cases. Even under pre-*Jencks* procedure whereby the statement of a witness was produced preliminarily to the trial judge for determination as to whether it contradicted the witness' trial testimony, the accused was entitled to the statement for impeachment purposes whether or not the witness had signed or adopted or approved it or, in the case of a record made by a government agent, whether or not it was a substantially verbatim account of what the witness had said and whether or not it had been recorded contemporaneously. Subsection (e), in other words, declares that material of a certain character is no longer available for use in cross-examination to test credibility. This is a substantial deprivation.

It is respectfully submitted that the very nature and character of the bitterness and invective with which the announcement of the decision in the *Jencks* case was greeted throughout the nation, and the sources from which the same emanated, supplies a definite indication that the *Jencks* doctrine is not considered to be a mere rule of Federal procedure by its very realistic critics but may constitute on the contrary the initiation of a trend to place judicial check reins on the extra-constitutional tendencies of ambitious investigating bodies and overzealous prosecutors.

The rule of the *Jencks* case clearly and conclusively involves the constitutional rights of defendants in criminal cases and is not a rule of mere procedure.

CONCLUSION

The decision below must be reversed and a new trial granted.

Respectfully submitted,

ISIDOR ENSELMAN,
Attorney for Petitioner.

JOHN T. SULLIVAN,
JULIUS MILLER,
of Counsel.